Supreme Court, U.S.
FILED

02 407 SEP 6 - 2002

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

EVA B. HUNTSINGER,
Petitioner,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SANDER N. KARP
Counsel of Record

LEAVENWORTH & KARP, P.C.
1011 GRAND AVENUE
P.O. DRAWER 2030
GLENWOOD SPRINGS, CO 81602
(970) 945-2261
(970) 945-7336 fax

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

110 pp

QUESTIONS PRESENTED

1. Should the determination of what constitutes protected speech on a matter of public concern by a public employee be decided primarily on the content of the speech or the alleged motive of the speaker?

2. Is a public employee's alleged speech made to prevent a prospective breach of the public trust, rather than a charge of current misfeasance by her public employer, protected speech under Supreme Court precedent and the First Amendment?

3. Where a public employer publishes false statements about an employee which impugn that employee's reputation and standing in the community, have the employee's substantive due process rights guaranteed by the Fourteenth Amendment been violated?

PARTIES TO THE PROCEEDINGS

Petitioner

Eva B. Huntsinger is a former Special Projects Manager for the E-470 Public Highway Authority in the Denver metropolitan area of Colorado.

Respondent

The Board of Directors for the E-470 Public Highway Authority is a body corporate and political subdivision of the State of Colorado. It operates the E-470 Public Highway Authority in the Denver metropolitan area of Colorado.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

I. Facts 4

II. The Opinions Below 10

REASONS TO GRANT THE WRIT 12

I. This Court Should Grant Certiorari To Resolve A Conflict In The Circuits Regarding The Extent To Which A Public Employee's Alleged Motive In Speaking Should Impact The Analysis Of Whether That Employee's Speech Is Protected Under *Connick* 13

II. This Court Should Grant Certiorari To Determine Whether First Amendment Protection Should Extend To Speech Relating To A Prospective Breach Of The Public Trust, Not Merely To Active Government Misconduct. 20

III. This Court Should Grant Certiorari To Determine Whether A Public Employee's Substantive Due Process Rights Are Violated When Her Employer Publishes False Statements About That Employee Which Impugn Her Reputation And Standing Within The Community 22

CONCLUSION 26

APPENDIX

Appendix A
Court of Appeals Order Denying
Petition for Rehearing, 7/10/02 . . . . . 1a

Appendix B
Court of Appeals Order and Judgment, 5/06/02 . . . . . 2a

Appendix C
District Court Order Granting
Motion for Partial Dismissal, 4/02/01 . . . . . 27a

Appendix D
District Court Judgment, 4/12/01 . . . . . 41a

Appendix E
District Court Recommendation of
Magistrate Judge, 8/26/99 . . . . . 44a

Appendix F
District Court Complaint, 2/8/99 . . . . . 60a

TABLE OF CITED AUTHORITIES

Cases:

Belk v. City of Eldon,
228 F.3d 872 (8th Cir. 2000) 15, 18

Boring v. Buncombe County BOE,
136 F.3d 364 (4th Cir. 1998) 16

Cockrel v. Shelby County School District,
270 F.3d 1036 (6th Cir. 2001) 14

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80
(1957) 19

Connick v. Myers,
461 U.S. 138, 103 S.Ct. 1684,
75 L.Ed.2d 708 (1983) . . . . . *passim*

David v. City & County of Denver,
101 F.3d 1344 (10th Cir. 1996) 19

Garcia v. City of Albuquerque,
232 F.3d 760 (10th Cir. 2000) 23

Gardetto v. Mason,
100 F.3d 803 (10th Cir. 1996) 18

Kincade v. City of Blue Springs,
64 F.3d 389 (8th Cir. 1995) 18

Kirkland v. Northside Independent School District,
890 F.2d 794 (5th Cir. 1989) 16

Linhart v. Glatfelter,
771 F.2d 1004 (7th Cir. 1985) 17

Maggio v. Sipple,
211 F.3d 1346 (11th Cir. 2000) 16

Nicholl v. E-470 Public Highway Authority,
896 P.2d 859 (Colo. 1995) 18

Palmer v. City of Monticello,
31 F.3d 1499 (10th Cir. 1994) 24

Pickering v. Board of Education,
391 U.S. 563, 88 S.Ct. 1731,
20 L.Ed.2d 811 (1968) 12-14

Romero v. Union Pac. R.R.,
615 F.2d 1303 (10th Cir. 1980) 19

U.S. v. City of Commerce City,
112 F.Supp 2d 1079 (D.Colo. 2000) 21

Constitutional Provisions:

U.S. Const., First Amendment . . . . . *passim*

U.S. Const., Fourteenth Amendment 2

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

42 U.S.C. § 1983 . . . . . 2, 3

C.R.S. § 18-8-308 22

C.R.S. § 24-18-101 22

Rules:

Fed. R. Civ. P. 12(b)(6) 10, 19, 23

Other References:

Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L.J. 43 (1988) 12

Black's Law Dictionary, 6th Ed. (1990) 24

Petitioner Eva B. Huntsinger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. B) affirming the District Court and the Tenth Circuit's denial of the petition for rehearing (App. A) were not selected for publication in the Federal Reporter. The opinion of the District Court for the District of Colorado dismissing petitioner's claims (App. C) and the recommendation of the Magistrate Judge (App. E) are similarly not published.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its order and judgment on May 6, 2002. The Petitioner filed a timely petition for rehearing, which the Tenth Circuit denied on June 10, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The U.S. Constitution, Amendment XIV, Section I, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The U.S. Constitution, Amendment XIV, Section V, provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 - Civil Action for Deprivation of Rights provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

> action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This matter comes before the Court as a case of retaliatory discharge of a public employee in violation of the First Amendment to the United States Constitution. Petitioner, Eva B. Huntsinger ("Huntsinger") suffered termination of employment after her disclosure of a potential conflict of interest which existed between the Board of Directors for the E-470 Public Highway Authority (the "Authority") and CH2M Hill Companies, Ltd. ("CH2M Hill"), an outside entity which had submitted a proposal to construct a portion of the E-470 public highway project. Same discharge violated Ms. Huntsinger's First Amendment right as a public employee to speak on matters of public concern. Ms. Huntsinger engaged in several communications with the Authority and representatives of CH2M Hill to disclose a potential conflict of interest and to prevent a potential breach of the public trust. However, in retaliation for her attempts to ensure the allocation of public funding in a manner free from the appearance of impropriety, the Authority terminated Ms. Huntsinger. The Authority went on to deprive Ms. Huntsinger of her substantive due process rights in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 when it published a false letter to several industry members which impugned

Ms. Huntsinger's good name and reputation, thus foreclosing her employment opportunities in the relevant market.

Ms. Huntsinger initiated this action in the District Court for the District of Colorado seeking redress for the Authority's retaliatory discharge in violation of the First Amendment, the Authority's deprivation of Ms. Huntsinger's substantive due process rights, and the Authority's breach of express and implied contract. The district court's jurisdiction arose pursuant to 28 U.S.C. § 1331.

I. Facts

Ms. Huntsinger, a professional civil engineer, worked for the Authority as a Special Projects Manager from February 5, 1996 until her termination of employment on or about October 8, 1998. App. F at 62a. The Authority is a body corporate and political subdivision of the state of Colorado established in 1987. The Authority controlled the financing, construction, and operation of a $300,000,000 public highway project ultimately designated as Colorado E-470 and located on the eastern perimeter of the Denver metropolitan area (the "Project"). *Id.* at 61a. At the time of her termination, Ms. Huntsinger's professional responsibilities included work preparatory to various consultants' submission of proposals to work on the Project, the review of these proposals, the Authority's response to inquiries regarding development and progression of the Project, and the Authority's evaluation and selection of future consultants for Segment IV of the Project ("Segment IV"). *Id.* at 63a. Ms. Huntsinger performed these duties in an exemplary fashion and received nothing but stellar employment evaluations prior to her termination. *Id.* at 62a.

One of Ms. Huntsinger's specific duties included the initial evaluation and review of proposals submitted by various entities bidding for the Segment IV construction contract. As relevant here, CH2M Hill, a Colorado contractor, submitted a proposal as one member of a team of potential contractors bidding on Segment IV. *Id.*

Ms. Huntsinger and her husband, Thomas Huntsinger, were both former employees of CH2M Hill. Prior to his resignation in February 1998, Mr. Huntsinger held the position of Executive Vice President of CH2M Hill. In connection with his resignation, CH2M Hill transferred shares of stock owned by Mr. Huntsinger to a promissory note (the "Note") with a face value of $296,000 and payable over a term of years or some shorter term as contemplated by the terms of the Note. A large portion of the Note's balance remained unpaid when the Authority received CH2M Hill's proposal for Segment IV in 1998. *Id.* at 62a-63a.

When Ms. Huntsinger first became aware of CH2M Hill's proposal in early September 1998, she perceived a potential conflict of interest existing between the Authority and CH2M Hill because of the outstanding Note. *Id.* at 63a-64a. More specifically, Ms. Huntsinger became concerned that her professional role in the evaluation process for the Authority's award of construction contracts could be viewed as compromised because one of the bidding entities owed her husband a substantial sum of money, arguably providing Ms. Huntsinger with a motivation to perpetuate the financial success of CH2M Hill at the expense of equally or more attractive bidders. Ms. Huntsinger, therefore, attempted to satisfy her ethical and lawful duty to disclose even perceived conflicts of interest, all for the purpose of preventing even an appearance of impropriety on the part of a public entity. The

Authority's own personnel policies[1] explicitly require disclosure of such conflicts. *Id.* at 63a. As a result, Ms. Huntsinger embarked on a series of communications in an attempt to provide proper disclosure and remove the potential conflict and ensure the Authority's allocation of public funding in the bidding and selection process for the Project in a fair and unbiased manner, consistent with the reasonable expectations of the taxpayers of the State of Colorado.

Ms. Huntsinger disclosed the potential conflict of interest both through channels available to her internally at the Authority and by contacting representatives of CH2M Hill, the principle entity with which the potential conflict of interest existed. On September 1, 1998, Ms. Huntsinger had two phone conversations with Mr. Dirk Stauthamer, Vice President of Human Resources at CH2M Hill, and the designated person overseeing employee separation issues, including in his role as the person responsible for preparing the separation agreement (including the Note) between Mr. Huntsinger and CH2M Hill. Ms. Huntsinger initiated these conversations for the purpose of evaluating "whether action could be taken with regard to the Note to remove the potential conflict". *Id.* at 64a. *See also* App. B at 5a. Ms. Huntsinger made no specific request for early retirement of the Note, although the face of the Note specifically contemplates such action. App. F at 62a-63a, 64a.

---

[1] Authority Personnel Policies, § 5.12: Conflict of Interest: No Employee shall engage in any activity or enterprise which conflicts with the duties as an Authority Employee or with the duties, functions, and responsibilities of the Division in which employed (sic).... Any potential or perceived conflict of interest must be reported, in advance, to the Executive Director.

Ms. Huntsinger also attempted to contact Mr. Stephen D. Hogan, the Authority's Executive Director, to disclose the existence of the potential conflict of interest. Upon learning of Mr. Hogan's extended unavailability, Ms. Huntsinger contacted T. Edward Icenogle, Esq., the Authority's outside legal counsel, for guidance. This phone conversation took place approximately fifteen minutes after Ms. Huntsinger's first conversation with Mr. Stauthamer. Ms. Huntsinger specifically informed Mr. Icenogle of her previous call to Mr. Stauthamer and her disclosure of the potential conflict of interest to representatives of CH2M Hill. Mr. Icenogle gave no indication that he viewed Ms. Huntsinger's call to CH2M Hill as improper and impliedly encouraged that continued course of action. *Id.* at 64a.

Ms. Huntsinger informed Mr. Hogan of the circumstances and the existence of a potential conflict of interest on September 8, 1998, at Mr. Hogan's first availability. On that same day, Ms. Huntsinger presented Mr. Hogan with a draft letter she had written, for Mr. Hogan's signature, to CH2M Hill. Ms. Huntsinger specifically modeled the draft after a letter previously signed by Mr. Hogan to address and resolve a conflict of interest between an Authority employee and another entity. Ms. Huntsinger presented the draft as **one alternative** for possible resolution of the conflict. Mr. Hogan affirmed the propriety of Ms. Huntsinger's draft proposal, but told her he planned to forward the draft to Mr. Icenogle for final approval. *Id.* at 64a-65a. Ms. Huntsinger's draft letter requested early retirement of the Note because the Authority had previously endorsed that approach, not because same would have resulted in personal benefit to Ms. Huntsinger. Indeed, early payment of the Note, as compared to payment over time, would have detrimentally impacted Ms. Huntsinger.

Ms. Huntsinger continued to pursue resolution options with CH2M Hill, resulting in Ms. Huntsinger's additional speech in which she confirmed that her "sole intent ... [was] to avoid any perceived conflict of interest relative to [CH2M Hill] and her" and to look "for suggestions by which we and [CH2M Hill] can resolve the issue at hand." *Id.* at 65a-66a. Finally, as a **second alternative** to alleviate the conflict and in response to CH2M Hill's counsel's statement, "the Note is free to be sold to a bank or any other party," Ms. Huntsinger researched the possibility of selling or assigning the Note to another entity. Ms. Huntsinger ultimately discovered that sale and assignment were not viable alternatives. *Id.* at 65a.

In response to a facsimile letter Ms. Huntsinger received on September 8, 1998 from Mr. Wyatt McCallie, CH2M Hill's general counsel, which erroneously portrayed the situation, Ms. Huntsinger immediately sent a letter to Mr. Hogan reiterating the potential conflict and confirming her intent to continue to recuse herself from the selection process regarding any work related to CH2M Hill. Ms. Huntsinger presented her own recusal as a **third alternative** to remove the conflict. *Id.* at 66a.

Having recused herself from the process for approximately one month, Ms. Huntsinger spoke to Mr. Icenogle on October 6, 1998 and inquired whether he had engaged in pertinent discussions regarding the Note. Mr. Icenogle advised Ms. Huntsinger that Mr. McDole, Ms. Huntsinger's direct supervisor, would direct Ms. Huntsinger regarding the conflict of interest. Ms. Huntsinger then directed her inquiry regarding resolution of the conflict to Mr. McDole, but he offered no resolution. *Id* at 67a. Ms. Huntsinger suffered termination on October 8, 1998. *Id.* at 66a.

Between September 8, 1998 and October 8, 1998, Ms. Huntsinger received no indication from the Authority that her approach to the conflict of interest situation had been improper. To the contrary, the Authority rated Ms. Huntsinger as "exceeding job requirements" on an intervening performance evaluation dated September 14, 1998. *Id.* Obviously, the vast majority of the protected speech had already been issued prior to the September 14, 1998 evaluation. In sum, up until October 8, 1998, Ms. Huntsinger received implied approval of her speech with regard to the conflict from both Mr. Icenogle and Mr. Hogan, *see Id.* at 64a-65a, and she received high praise for her job performance from the Authority, *see Id.* at 66a., which Ms. Huntsinger perceived to include her handling of the conflict.

Subsequently, on or about October 23, 1998, the Authority sent the following letter to entities submitting proposals on Segment IV:

> This letter is to advise you of a situation which has occurred in connection with the Authority's Segment IV procurement. There has been an unauthorized contact by an Authority employee with one member of a team responding to the Authority's Segment IV Request for Qualification by stating its qualifications to propose on the finance/design/build of Segment IV of E-470.
>
> An employee of the Authority, who may have been considered for a minor role in reviewing Segment IV proposals, contacted one of the Segment IV respondents and requested that, in order to resolve a perceived conflict of interest, one of the members of the responding

> team pay a debt owed, but not yet due, to the employee's spouse.
>
> The Authority has conducted a thorough investigation of this matter. The Authority assures you that this employee has not been involved in any review of Segment IV proposals or in the administration of the contract, if awarded. The Authority wishes to further state all its staff and consultants will be instructed that no proposer is to be favored or disfavored by the Authority as a result of that employee's unauthorized contact or any consequences of that contact.

This letter is false and impugned Ms. Huntsinger's good name and reputation. *Id.* at 68a-69a.

II. The Opinions Below

Ms. Huntsinger filed suit against the Authority on or about February 8, 1999 in the District Court of Colorado, for retaliatory discharge in violation of her right of free speech guaranteed by the First Amendment to the United States Constitution. Ms. Huntsinger also brought a claim for violation of her substantive due process rights based on a deprivation of liberty interests related to the October 23, 1998 letter, which seriously damaged Ms. Huntsinger's standing and associations in the community and foreclosed her freedom to take advantage of future employment opportunities. *Id.* at 60a-61a. The district court dismissed Ms. Huntsinger's federal claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. App. C. at 37a-38a. The court then declined to retain supplemental

jurisdiction over Ms. Huntsinger's state law claims and dismissed those claims without prejudice. *Id.* at 38a-39a.

The Authority's October 23, 1998 letter falsely implies that Ms. Huntsinger exclusively considered early retirement of the Note to resolve the conflict of interest, but failed to pursue any another alternative. In that respect, the district court accepted the Authority's position that Ms. Huntsinger's motives were personal and involved early retirement of the Note, and therefore held that her speech failed the "matter of public concern" test for entitlement to protection. *Id.* at 36a. However, as revealed in the Complaint, Ms. Huntsinger presented at least three possible alternatives to the Authority and CH2M Hill to remove the potential conflict of interest: 1) early retirement of the Note consistent with the Authority's previous practice, App. F at 64a; 2) sale or assignment of the Note to another entity, *Id.* at 65a; or 3) Ms. Huntsinger's recusal from the selection and bidding process, *Id.* at 66a. Additionally, Ms. Huntsinger reiterated time and again that her desire to prevent the appearance of impropriety by the Authority in the bidding and selection process motivated her speech. *Id.* at 60a, 63a-64a, 65a-66a. Therefore, the district court went beyond the pleadings in review of the motion to dismiss and failed to construe the Complaint in the light most favorable to Ms. Huntsinger.

The Court of Appeals for the Tenth Circuit affirmed the lower court's decision dismissing Ms. Huntsinger's Complaint. The court reasoned that Ms. Huntsinger's complaint demonstrated "that her speech related solely to her personal interest" and therefore was not a matter of public concern. App. B at 17a. In reaching its conclusion, the Tenth Circuit relied on the district court's determination that Ms. Huntsinger's speech was "motivated by primarily personal interest." *Id.* at 15a. The court made these

conclusions about Ms. Huntsinger's motive(s) on a motion to dismiss and without the benefit of discovery. Additionally, the court gave minimal consideration to the content of Ms. Huntsinger's speech, which addressed the important issue of allocation of public funding on a multi-million dollar state highway project. Also, the court found it significant that Ms. Huntsinger's Complaint lacked allegations of active corruption or malfeasance by the Authority. *Id.* at 18a. The court then rejected the proposition "that the law should be extended to protect not only speech relating to active government misconduct, but also to speech made as a supposed preemptive strike against possible misconduct." *Id.* at 21a.

With regard to Ms. Huntsinger's substantive due process claim, the court found that Ms. Huntsinger's Complaint failed to demonstrate that the statements contained within the Authority's letter were false and failed to set forth facts alleging that the letter impugned her good name, reputation, or integrity. *Id.* at 22a-24a.

REASONS TO GRANT THE WRIT

For at least 30 years, it has been firmly established that public employees have a right to free speech under the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). However, since this Court's decision in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), there has been much debate and conflict among the lower courts as to what type of speech constitutes a "matter of public concern" in a public employment context, thereby affording it protection. *See* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L.J. 43 (1988). Additionally, the lower courts have inconsistently

evaluated and applied the *Pickering* balancing test. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1735. It is precisely because of these inconsistencies and the need to resolve interpretative conflicts among the lower courts that this Court should grant certiorari under the circumstances presented. The inconsistencies in the decisions of the lower courts have left public employees and employers without a clear standard by which to proceed regarding an employee's right to speak and an employer's right to discipline or terminate an employee for certain speech. Therefore, this Court should grant certiorari in this case to clarify these inconsistencies and to set authoritative standards for the lower courts.

I. This Court Should Grant Certiorari To Resolve A Conflict In The Circuits Regarding The Extent To Which An Employee's Motive In Speaking Should Impact The Analysis Of Whether That Employee's Speech Is Protected Under *Connick*.

This Court in *Connick* held that matters of public concern are those which can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. This Court went on to state:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest..., a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147, 103 S.Ct at 1690. To determine whether or not particular speech is a matter of public concern, a court must look at the content, form, and context of that speech, "as revealed by the whole record". *Id.* at 147-148, 103 S.Ct. at 1690.

Once a court determines that a public employee's speech involves a matter of public concern, it must then determine whether the employee's First Amendment interests outweigh the employer's interest in promoting the efficiency of the public services it performs. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. In the current case, the Tenth Circuit found that Ms. Huntsinger's speech did not involve a matter of public concern and, therefore, did not address the balancing issues. App. B at 21a.

When determining the threshold question of whether or not an employee's speech is protected, the Courts of Appeal inconsistently apply the *Connick* standard. In a recent decision by the Sixth Circuit, the court addressed the *Connick* standard and its application among the Courts of Appeal. *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001). The *Cockrel* court found that decisions in the Fourth and Fifth Circuits extended the Supreme Court's language in *Connick* beyond that intended by emphasizing the question of whether the employee spoke as an employee or as a citizen. *Id.* at 1051. The *Cockrel* court stated:

> [T]he key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern. Thus, even if a public employee were acting out of a private motive with no intent to air her speech publicly,... so long as the speech

> relates to matters of 'political, social, or other concern to the community,' as opposed to matters 'only of personal interest,' it shall be considered as touching upon matters of public concern.

Id. at 1052. Therefore, the Sixth Circuit emphasizes the **content** of the speech and whether or not it touches upon a matter of public concern to the community, rather than the role of the speaker in issuing the speech. *Id.*

The Eighth Circuit also limits its consideration to the speech itself and whether or not it addresses matters of public concern, rather than extending the analysis beyond the content of the speech. *Belk v. City of Eldon*, 228 F.3d 872, 880 (8th Cir. 2000). In *Belk*, the plaintiff spoke privately with a member of the Eldon Board of Alderman regarding rumors about a sexual relationship between a co-employee and her supervisor and the plaintiff's belief that the employee was receiving health insurance benefits to which she had no entitlement. *Id.* at 877. The Eighth Circuit rejected the defendant's position that the plaintiff's speech was not protected because the plaintiff spoke privately, the statements were purely "job-related," and the plaintiff sought to spread gossip and animosity toward her co-employee. *Id.* at 878. Instead, the *Belk* court noted that the plaintiff's speech related to the use of public funds, widely recognized as a matter of public concern. *Id.* The court concluded that the presence of unsavory personal motives does not eviscerate First Amendment protection of an employee's speech "so long as the speech itself addresses matters of public concern. . . . Any prurient appeal that [the plaintiff's] statements may have contained did not affect their underlying content." *Id.* at 880 (*citing Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

In contrast, the Fourth and Fifth Circuit decisions emphasize the **role** of the speaking employee. *See Kirkland v. Northside Independent School District*, 890 F.2d 794, 798-99 (5th Cir. 1989); *Boring v. Buncombe County BOE*, 136 F.3d 364, 368 (4th Cir. 1998) (relying on *Kirkland*). The *Kirkland* court noted that the definition of what constitutes "matters of public concern" lacks precision. *Kirkland*, 890 F.2d at 798. However, in determining whether or not an employee's speech touched on a matter of public concern, the *Kirkland* court concluded that speech achieves protected status "if the words or conduct are conveyed by the [employee] in his **role as a citizen** and not in his **role as an employee** of the school district." *Id.* at 799 (emphasis in original).

The Eleventh Circuit applies a similar standard. In *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), the court stated that in determining whether or not a public employee's speech constitutes a matter of public concern, the "relevant inquiry is not whether the public would be interested in the topic of the speech at issue but rather is 'whether the purpose of [the plaintiff's] speech was to raise issues of public concern.'" *Maggio*, 211 F.3d at 1353 (*quoting Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993)). In *Maggio*, the plaintiff testified on behalf of her supervisor at her supervisor's grievance hearing. *Id.* The plaintiff asserted that her testimony constituted a matter of public concern because it related to the fair and honest implementation of [the employer's] personnel policies. *Id.* at 1353. The court noted that the public arguably might be interested in the implementation of the employer's personnel policies. However, the court went on to evaluate the plaintiff's motives behind the speech - namely, that by testifying on behalf of her supervisor, she would curry favor with that supervisor and possibly improve the conditions of her employment. Therefore, because the plaintiff's speech had a "primary

purpose" relating to a private grievance, the court held that the plaintiff spoke primarily as an employee upon matters of personal interest rather than as a citizen on behalf of the public. *Id.*

The Seventh Circuit agrees with the Fourth, Fifth, and Eleventh Circuits that the *Connick* test requires courts to consider the motive underlying the speech in order to determine whether or not it is protected. In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), the Seventh Circuit viewed *Connick* as requiring the courts "to look at the **point** of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are public concern? Or was the point to further some purely private interest?" (Emphasis in original.) The *Linhart* court went on to emphasize that even if the speech in fact touched upon a matter of public concern, the court must look beyond the issues raised by the employee's speech to the employee's motive in raising those issues in order to determine if the speech is protected under *Connick*. *Id.*

The Tenth Circuit, in Ms. Huntsinger's case, emphasized Ms. Huntsinger's motives in speaking, rather than the content of her speech, in determining that the speech fell short of a matter of public concern. *See* App. B at 15a-18a. The *Huntsinger* court stated that the essential question in determining whether or not speech is a matter of public concern is "whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee." *Id.* at 14a (*quoting Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999)). Although the stated standard resembles the standard applied by the Sixth Circuit in

Cockrel, the *Huntsinger* court improperly emphasized the alleged private motives underlying the speech at issue and did not give sufficient attention to the content of Ms. Huntsinger's speech. *Id.* at 15a-18a.

In essence, the Tenth Circuit emphasized Ms. Huntsinger's role in issuing the speech when it focused on the potential personal motives behind the speech. The Tenth Circuit's approach differs dramatically from the Eighth in *Belk*, in which the court held that so long as the content of the speech addresses matters of public concern, the motives underlying the speech are irrelevant. *Belk*, 228 F.3d at 880. Ms. Huntsinger contends that the content of her speech can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick,* 461 U.S. at 146, 103 S.Ct. at 1690. In fact, the topic of Ms. Huntsinger's speech involved a potential conflict of interest related to the Authority's fair and unbiased allocation of public highway funds. *Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996) (it is a general rule that speech about the use of public funds touches upon a matter of public concern); *See also Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995), cert denied, 517 U.S. 1166, 116 S.Ct. 1565 (1996); *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000).

Furthermore, the Colorado Supreme Court previously recognized the importance of speech, public input, and public debate on issues pertaining to the funding of the E-470 Highway project specifically. Indeed, Colorado tax payers have standing to sue the Authority to obtain the Authority's compliance with certain constitutional funding requirements. *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 866 (Colo. 1995). Thus, because the content of Ms. Huntsinger's speech touched on matters of public concern to citizens in Colorado, the lower court erred when it determined

that purely private interests motivated her speech, and therefore it was not protected.

It should also be noted that the lower courts decided this issue on a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. App. B at 3a. Upon such a motion, the court must accept all well-pleaded allegations in the Complaint as true and must construe those allegations in the light most favorable to the moving party. *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). All reasonable inferences must be resolved in favor of the non-moving party and dismissal is inappropriate unless Ms. Huntsinger can prove no set of facts in support of her claims that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102 (1957). The Complaint clearly alleges that Ms. Huntsinger intended to resolve a potential conflict of interest to avoid the appearance of impropriety by the Authority. *See* App. F at 60a-61a, 63a-64a, 65a-66a. Despite this, the Tenth Circuit concluded that Ms. Huntsinger, "can prove no facts to establish that her motive for speaking was other than personal." App. B at 17a. Specifically, the lower courts accepted the Authority's assertions, rather than the well-pled facts in the Complaint, that Ms. Huntsinger's sole motive revolved around early retirement of the Note. *Id.* at 16a; App. C at 36a. Additionally, establishing motive nearly always requires extensive factual and credibility determinations not appropriate for disposition absent the presentation of evidence. *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1309 (10th Cir. 1980). Therefore, Ms. Huntsinger contends that both the district court and the Tenth Circuit Court misapplied the standard for review, and asks this Court to correct this error.

In sum, the Petitioner requests that this Court grant certiorari to resolve a conflict in the lower courts between emphasis on the content of the speech versus emphasis on the role of the speaker issuing the speech, all for the purpose of applying the *Connick* test. Additionally, the Petitioner requests this Court's reversal of the Tenth Circuit's holding because it went beyond the allegations of the Complaint, a result inappropriate on a motion to dismiss.

II. This Court Should Grant Certiorari To Determine Whether First Amendment Protection Should Extend To Speech Relating To A Prospective Breach Of The Public Trust, Not Merely To Active Government Misconduct.

In *Connick*, an employee in the District Attorney's office submitted a questionnaire to her co-employees regarding office morale and disciplinary measures. *Connick*, 461 U.S. 138, 103 S.Ct. 1684. In finding that these questions were not matters of public concern, the Court noted that the employee did not "seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." *Id.* at 148, 103 S.Ct. at 1691.

In the current case, although Ms. Huntsinger did not make any allegations of current or ongoing misfeasance by the Authority, her speech addressed an issue involving a potential conflict of interest related to the bidding process for Segment IV. App. F at 60a-61a. In fact, Ms. Huntsinger spoke for the purpose of preventing a potential breach of the public trust when she communicated this potential conflict of interest to both members of CH2M Hill and the Authority. The Tenth Circuit declined to accept the position that the First Amendment protects speech relating not only to active

government misconduct, but also "to speech made as a supposed preemptive strike against possible misconduct." App. B at 21a.

The court in *Huntsinger* placed great emphasis on the lack of allegation that the Authority acted improperly with relation to the potential conflict of interest involved. *Id.* at 18a-20a. However, this emphasis is misplaced and does not adhere to the test outlined in *Connick*. This Court in *Connick* recognized that a **potential** breach of the public trust is a matter of public concern. *Connick*, 461 U.S. at 148, 103 S.Ct. 1684 (emphasis added). Therefore, an employee's speech need not address active government misfeasance in order to be considered a matter of public concern. Indeed, an employee's speech addressing potential misfeasance presents a sufficient tie to matters of public concern to justify protection. Additionally, the issues surrounding a potential conflict of interest here related to the allocation of public funding, and is most certainly a matter of public concern, as shown by case law and state statutes. *See U.S. v. City of Commerce City*, 112 F.Supp.2d 1079 (D.Colo. 2000)[2];

---

[2] "There is no question that a conflict of interest violation committed by a public official is a matter of public concern. Indeed, such conflicts are a serious breach of the public trust that government officials will not use their offices to reap personal financial benefits not available to others." *City of Commerce City*, 112 F.Supp.2d at 1087.

C.R.S. § 24-18-101[3]; C.R.S. § 18-8-308[4].

Ethical rules and state regulations required Ms. Huntsinger to disclose the potential conflict of interest at issue. By doing so, Ms. Huntsinger attempted to prevent active misfeasance, both by her own conduct, and by the Authority's conduct. This speech deserves equal protection as speech addressing active misconduct by government officials. Therefore, the Petitioner requests this Court's recognition that speech addressing a potential breach of the public trust, as opposed to active government misconduct, is similarly entitled to First Amendment protection consistent with *Connick*.

III. This Court Should Grant Certiorari To Determine Whether A Public Employee's Substantive Due Process Rights Are Violated When Her Employer Publishes False Statements About That Employee Which Impugn Her Reputation And Standing Within The Community.

In its decision in this case, the Tenth Circuit affirmed the lower court's decision dismissing Ms. Huntsinger's substantive due process claim. App. B at 22a. Specifically,

---

[3] Recognizing that conflicts of interest may exist between an employee's public duty and his or her private interest and noting the importance of the standard of conduct.

[4] A public servant who fails to disclose a conflict of interest in connection with a contract with which she exercises any substantial discretionary function, without timely and properly giving notice to the state and the governmental entity of such conflict, commits a class 2 misdemeanor.

the court noted that in order to survive a motion to dismiss on this claim, the complaint must contain allegations sufficient to prove that "'(1) the defendant made a statement impugning [the employee's] good name reputation, honor or integrity[,] (2) the statement was false[,] (3) the defendant made the statement in the course of the termination proceedings or the statement foreclosed future employment opportunities[,] and (4) the statement was published.'" *Id.* (*quoting Garcia v. City of Albuquerque*, 232 F.3d 760, 772 (10th Cir. 2000)). The court agreed with the conclusions of the district court that Ms. Huntsinger's complaint failed to demonstrate that the statements in the Authority's letter were false and that it failed to set forth facts alleging that the letter impugned Ms. Huntsinger's good name, reputation, or integrity. *Id.* at 22a-24a. The court went on to state that:

> (i) Ms. Huntsinger avers in her complaint that she indeed contacted CH2M Hill prior to receiving authorization from her supervisors at the Authority, (ii) nothing in the complaint or the letter itself alleges that Ms. Huntsinger engaged in any act of dishonesty or immorality, (iii) Ms. Huntsinger's complaint does not allege that Ms. Huntsinger actually sought and was denied employment with any of the companies to whom the letter was sent.

Id. at 24a.

The Petitioner avers that the lower court misapplied the standard for a Fed. R. Civ. P. 12(b)(6) motion to dismiss by not incorporating the well-pled facts in the Complaint and accepting them as true. Therefore, the Tenth Circuit erred when it adopted the findings of the lower court. First, the Complaint indeed alleged facts that the letter contained false

statements. In paragraph 28 of the Complaint, Ms. Huntsinger alleges that the letter is defamatory per se. App. F at 68a-69a. By definition, this is an allegation that the statements included in the letter are intentionally false. *See* Blacks Law Dictionary, 6th Ed. (1990) (defamation is an "intentional false communication, either published or publicly spoken, that injures another's reputation or good name"). Additionally, as shown in the Complaint, the allegation that Ms. Huntsinger made a request to CH2M Hill for early retirement of the Note, as an exclusive remedy, is clearly false. Indeed, the Complaint shows that Ms. Huntsinger did not specifically request of Mr. Stauthamer or other persons at CH2M Hill that the Note be retired early. App. F at 64a.

Additionally, the Complaint clearly alleges that the letter impugned Ms. Huntsinger's good name and reputation. In paragraph 31 of the Complaint, Ms. Huntsinger states, "the Authority defamed Ms. Huntsinger by sending out the October 23 letter to numerous companies, the number of which will be determined in discovery, with whom Ms. Huntsinger worked for years, and with whom she intended to work in the future, thereby severely damaging her professional and personal reputation." *Id.* at 71a. Therefore, Ms Huntsinger alleged sufficient facts to assert a substantive due process claim at that early stage of the proceedings.

Finally, it is not a requirement that the Complaint allege facts that Ms. Huntsinger actually sought and was denied employment as a result of the letter, as the Tenth Circuit asserts. Rather, the Complaint need only contain allegations of a termination based on a publicized false charge of sufficient severity that would make her an unlikely candidate for future employment. *Palmer v. City of Monticello*, 31 F.3d 1499, 1503 (10th Cir. 1994). As the Complaint states, Ms. Huntsinger had worked in the past and

planned to continue working, with the companies to which the Authority's letter addressed its correspondence. The letter by the Authority implicitly publicized that Ms. Huntsinger's "unauthorized contact" led to an investigation which resulted in her exclusion from further involvement with Segment IV processes. The letter implies that community members can no longer trust Ms. Huntsinger's professionalism, honesty, and integrity, thereby damaging her reputation and stigmatizing her work. In doing so, the Authority materially curtailed, and essentially foreclosed, Ms. Huntsinger's professional employment opportunities. It follows that Ms. Huntsinger has been unconstitutionally deprived of her protected liberty interest in employment.

In sum, Ms. Huntsinger's Complaint fairly alleges that the government published false information which caused a negative stigma regarding her professionalism and integrity and resulted in significant damage to her professional and personal reputation. Ms. Huntsinger further alleged that the government published such false information in connection with its termination of her employment. App. F at 72a. At a minimum, Ms. Huntsinger should have had an opportunity to develop her claim through discovery, including the knowledge of industry professionals regarding the content and reasonable implications of the Authority's letter, the extent of actual damage to Ms. Huntsinger's reputation and career, and the extent of lost employment opportunities.

Because Ms. Huntsinger identified a viable theory of recovery in her Complaint, the Tenth Circuit should have reversed the trial court's grant of the Authority's Motion to Dismiss. Accordingly, Ms. Huntsinger respectfully requests that this Court reverse the Tenth Circuit's order and reinstate the substantive due process claim for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed May 6, 2002]

No. 01-1218

EVA B. HUNTSINGER,
Plaintiff-Appellant,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Defendant-Appellee.

(D. Colorado). (D.C. No. 99-S-260)

JUDGES:
Before HENRY, ANDERSON, and MURPHY, Circuit Judges.

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be

Eva B. Huntsinger brought this action under 42 U.S.C. § 1983 against the Board of Directors of the E-470 Public Highway Authority ("Authority"), alleging that she was terminated from her employment in violation of her First Amendment right to speak on a matter of public concern, and that the Authority interfered with her opportunities for future employment in violation of her Fourteenth Amendment substantive due process rights. She also alleged state law causes of action for breach of express contract and breach of implied contract. The district court dismissed Ms. Huntsinger's federal claims pursuant to Fed. R. Civ. P. 12(b)(6), reasoning that Ms. Huntsinger's complaint did not state claims upon which relief could be granted. The court then declined to retain supplemental jurisdiction over Ms. Huntsinger's state law claims and dismissed them without prejudice.

On appeal, Ms. Huntsinger reasserts the arguments she presented to the district court, and also contends that the district court applied the wrong standard for dismissal under Fed. R. Civ. P. 12(b)(6). In addition, she argues that the district court abused its discretion by dismissing her state claims. As indicated by the discussion below, we largely agree with the reasoning of the district court and affirm.

---

cited under the terms and conditions of 10th Cir. R. 36.3.

BACKGROUND

A. Facts

As required by our review of a dismissal pursuant to Fed. R. Civ. P. 12(b)(6), the following facts are taken directly from the allegations contained in Ms. Huntsinger's complaint. Ms. Huntsinger is a professionally licensed civil engineer who worked at the Authority as a Special Projects Engineer from February 5, 1996, until her termination on October 8, 1998. The Authority is a "body corporate and political subdivision of the state of Colorado established in 1987," and is "responsible for the financing, construction and operation of a toll highway designated as E-470, located on the eastern perimeter of the Denver metropolitan area ('Project')." Compl. at P 5. Prior to her termination from the Authority, Ms. Huntsinger's responsibilities included "work preparatory to the submission of proposals by consultants . . .,review of [the] same proposals, response to inquiries regarding development of the Project, and selection of future consultants for Segment IV of the [Project]." Appellant's Opening Br. ("Appellant's Br.") at 3 (citing Compl. at P 13). Ms. Huntsinger earned approximately $ 90,000 per year, including benefits, and received "nothing but stellar employment evaluations" prior to her termination. Compl. at P 8.

In the summer and fall of 1998, the Authority received a number of proposals from bid teams seeking to secure the construction contract for Segment IV. One such proposal included a consultant by the name of CH2M Hill ("Hill"). Ms. Huntsinger's husband worked for Hill for nearly twenty-five years, serving as its Executive Vice President at the time

of his resignation in February 1998. In connection with his resignation, Mr. Huntsinger received a $ 296,000 promissory note ("Note") from Hill, a large portion of which remained unsatisfied but was not yet due at the time the Authority received Hill's proposal.

Ms. Huntsinger asserts that when she became aware of the Hill proposal on September 1, 1998, "she became concerned that the Note from Hill to Mr. Huntsinger potentially created a conflicting interest between the Authority and Hill." *Id.* at P 14. In response, Ms. Huntsinger took it upon herself to "see whether action could be taken with regard to the Note to remove the potential conflict." *Id.* at P 15. In this regard, Ms. Huntsinger embarked on a series of communications with various persons associated with both Hill and the Authority:

> 1. On September 1, 1998, Ms. Huntsinger had two phone conversations with Mr. Dirk Stauthamer, "Vice President of Human Resources at Hill, and the person responsible for preparing a separation agreement between Mr. Huntsinger and Hill." *Id.* According to Ms. Huntsinger, the purpose of these conversations was to "see whether action could be taken with regard to the Note to remove the potential conflict." *Id.*
>
> 2. After Ms. Huntsinger spoke with Mr. Stauthamer, she attempted to contact Mr. Stephen D. Hogan, the Authority's Executive Director. When he could not be reached, she called Mr. T. Edward Icenogle, the

Authority's outside counsel.[1] Ms. Huntsinger asserts that she "informed [Mr. Icenogle] of her call to Mr. Stauthamer" and that he told her "that calling Mr. Stauthamer was the correct approach." *Id.* at P 16.

3. On September 8, 1998, Ms. Huntsinger finally spoke with Mr. Hogan, in person, and informed him "of the potential conflicting interest." *Id.* at P 17. During this meeting, she "presented Mr. Hogan with a draft letter she had written, for Mr. Hogan's signature, to the chief financial officer of Hill, pursuant to which Mr. Hogan would ask Hill to retire the Note to avoid any potential conflict of interest." *Id.* at P 17. Ms. Huntsinger contends that she "modeled this draft letter after a similar letter that Mr. Hogan had signed on behalf of another Authority employee under similar circumstances," and that "Mr. Hogan told [her] that he had no problem with her approach, but that he first wanted to fax the draft to Mr. Icenogle for his review." *Id.* According to Ms. Huntsinger, "the draft was faxed to Mr. Icenogle," but "Mr. Hogan never signed or sent [it] to Hill." *Id.*

4. Later on September 8, after her meeting with Mr. Hogan, Ms. Huntsinger received a

---

[1] Ms. Huntsinger asserts that this call occurred "approximately fifteen minutes after her first conversation with Mr. Stauthamer." Compl. at P 16.

facsimile letter from Mr. Wyatt McCallie, Hill's general counsel. According to Ms. Huntsinger, Mr. McCallie's letter "erroneously stated that Ms. Huntsinger told Mr. Stauthamer that 'the conflict could result in [Hill] being removed from the selection process.'" *Id.* at P 19. The letter further suggested that Mr. Huntsinger go ahead and "submit a written request for prepayment of the Note to Hill's Board of Directors prior to the next board meeting." *Id.* at P 19. In response to this facsimile letter, Ms. Huntsinger "left two voice mail messages for Mr. McCallie describing the errors in his . . . correspondence" and provided him with a letter of her own, dated September 9, 1998, "describing . . . that her 'sole intent . . . [was] to avoid any perceived conflict of interest relative to [Hill] and her' and to look 'for suggestions by which we and [Hill] can resolve the issue at hand.'" *Id.* at P 20 (emphasis added).

5. After receiving Mr. McCallie's facsimile on September 8, Ms. Huntsinger immediately sent a letter to Mr. Hogan "to reiterate the potential conflict . . . [and] that she would continue to recuse herself from the selection process for any work related to Hill." *Id.* at P 21.

6. Finally, Ms. Huntsinger spoke to Mr. Icenogle on October 6, 1998, to inquire whether "he had any discussions regarding the

> Note." *Id.* at P 24. According to Ms. Huntsinger, Mr. Icenogle responded that "he had had 'informal' communications with Mr. McCallie," and that she would "get her marching orders from Matt McDole."[2] *Id.* at P 24. Ms. Huntsinger contends that she immediately contacted Mr. McDole, who said "he knew nothing about it." *Id.*

On October 8, 1998, two days after the last of these communications, Ms. Huntsinger received a notice of termination in her office mailbox. In an October 14, 1998, letter from Mr. Icenogle, "the Authority purported to fully explicate the basis for [Ms. Huntsinger's] termination," stating that she had "violated four sections of the Authority's personnel policies."[3] *Id.* at P 25. One such policy stated as follows:

> *Conflict of Interest*: No Employee shall engage in any activity or enterprise which conflicts with the duties as an Authority Employee or with the duties, functions, and responsibilities

---

[2] Mr. McDole was the Authority's chief engineer, and was apparently Ms. Huntsinger's immediate supervisor. Compl. at P 23.

[3] A pre-termination hearing was held in front of Mr. McDole, who affirmed Ms. Huntsinger's termination in a one paragraph decision on November 23, 1998. Compl. at P 27. Subsequently, a post-termination hearing was held in front of the Authority's acting Executive Director, who affirmed Mr. McDole's decision on January 8, 1998. *Id.*

> of the Division in which employed (sic) . . . . Any potential or perceived conflict of interest must be reported, in advance, to the Executive Director.

Id. at P 12 (citing Authority Personnel Policies, § 5.12) (second emphasis added).

On October 23, 1998, the Authority sent a letter to all consultants submitting proposals on Segment IV explaining the situation regarding Ms. Huntsinger's contacts with Hill. This letter states as follows:

> This letter is to advise you of a situation which has occurred in connection with the Authority's Segment IV procurement. There has been an unauthorized contact by an Authority employee with one member of a team responding to the Authority's Segment IV Request for Qualification by stating its qualifications to propose on the finance/design/build of Segment IV of E-470.
>
> An employee of the Authority, who may have been considered for a minor role in reviewing segment IV proposals, contacted one of the Segment IV respondents and requested that, in order to resolve a perceived conflict of interest, one of the members of the responding team pay a debt owed, but not yet due, to the employee's spouse.

> The Authority has conducted a thorough investigation of this matter. The Authority assures you that this employee has not been involved in any review of Segment IV statements of qualification and will not be involved in any future review of Segment IV proposals or in the administration of the contract, if awarded. The Authority wishes to further state all of its staff and consultants will be instructed that no prosper is to be favored or disfavored by the Authority as a result of that employee's unauthorized contact or any consequences of that contact.

Id. at P 28 (quoting the Authority's October 23, 1998, letter).

2. Procedure

Ms. Huntsinger filed suit against the Authority on or about February 8, 1999, claiming that the Authority had "no legal or factual basis for [its] position" that she violated four sections of the Authority's personnel policies, *id.* at P 25, and that she was terminated as a result of her efforts to "resolve the potential conflict(s) of interest" with Hill. *Id.* at P 31. In her first claim for relief against the Authority, Ms. Huntsinger asserts that her "actions in attempting to resolve the potential conflict(s) of interest were protected by the First Amendment to the United States Constitution," *id.*, and that the Authority terminated her "in retaliation" for her exercise of her First Amendment rights, in violation of 42 U.S.C. § 1983. *Id.* at P 33. Ms. Huntsinger's claim in this regard is based entirely on the six instances of communication described above.

Ms. Huntsinger's second claim for relief, entitled "Substantive Due Process," alleges that the Authority "took action to terminate [her] based on the October 23 1998 [letter]," *id.* at P 31, that the letter "seriously damaged [her] standing and associations in the community and foreclosed her freedom to take advantage of future employment opportunities," *id.* at P 38, and that she was thereby "deprived . . . of her liberty interest in her employment in violation of the Fourteenth Amendment to the United States Constitution," also in contravention of 42 U.S.C. § 1983. *Id.* at P 39. Ms. Huntsinger further asserted two state law claims alleging that the Authority breached either an express or an implied contract of employment. *Id.* at PP 41-54.

In April 1999, the Authority filed its motion to dismiss Ms. Huntsinger's federal causes of action. Regarding Ms. Huntsinger's First Amendment claim, the Authority argued that "Ms. Huntsinger cannot meet the threshold requirement of showing that her alleged speech involved a matter of public concern." Def's Mot. for Partial Dismissal at 5, App. at 42. Regarding her Substantive Due Process claim, the Authority asserted that she had no claim for deprivation of a liberty interest under the Fourteenth Amendment because, as a matter of law, she "can prove no set of facts establishing that [the October letter] falsely stigmatized her, impugning her good name, reputation, honor, or integrity, or curtailing her future employment opportunities." *Id.* at 9, App. at 46.

The Authority's motion was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b). After considering the briefs and hearing argument from the parties, the magistrate judge issued a detailed and comprehensive report recommending the dismissal of Ms. Huntsinger's federal

claims. Ms. Huntsinger filed the appropriate objections to the magistrate judge's recommendations, advancing additional arguments as to why her First Amendment claims should not be dismissed, and relying on her original opposition brief with respect to her Substantive Due Process claim. Upon de novo review of the parties' filings, including Ms. Huntsinger's objections, the district court adopted the recommendations of the magistrate judge and dismissed Ms. Huntsinger's federal claims.

With regard to Ms. Huntsinger's First Amendment claim the district court concluded that "Ms. Huntsinger's communications . . . about a potential conflict of interest was [sic] not sufficiently helpful in evaluating the conduct of [the] government so as to constitute speech on a matter of public concern," and was "instead speech primarily addressed to a matter of personal interest." Order at 9, App. at 149. Regarding Ms. Huntsinger's Substantive Due Process claim, the district court adopted the magistrate judge's conclusion that the "plaintiff has not shown that the statements made in the October 23, 1998 letter are false or that, if false, they directly attack plaintiff's character and reputation." Recommendation of Magistrate Judge at 11, App. at 105; see also Order at 4, App. at 144.

DISCUSSION

I.

"We review de novo the district court's dismissal for failure to state a claim upon which relief can be granted." *Dill v. City of Edmond*, 155 F.3d 1193, 1201 (10th Cir. 1998) (citing *Pelt v. Utah*, 104 F.3d 1534, 1540 (10th Cir. 1996)). In so doing, we consider the complaint as a whole, accepting

all well-pleaded factual allegations as true, and construing those allegations, and all reasonable inferences therefrom, in the light most favorable to Ms. Huntsinger as the non-moving party. *Id.*; *Dry v. United States*, 235 F.3d 1249, 1252 (10th Cir. 2000); *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). Dismissal is "inappropriate unless [Ms. Huntsinger] can prove no set of facts in support of [her] claims that would entitle [her] to relief." *Dill*, 155 F.3d at 1201. In conducting our analysis, however, we need not accept as true any conclusory allegations contained in the complaint, *Southern Disposal, Inc. v. Texas Waste Mgmt.*, 161 F.3d 1259, 1262 (10th Cir. 1998), and a party may not overcome pleading deficiencies by advancing arguments on appeal that extend beyond the actual allegations contained in the complaint. *Bauchman v. West High School*, 132 F.3d 542, 550 (10th Cir. 1997). Applying these standards of review, we address each of Ms. Huntsinger's Section 1983 claims in turn.

A. First Amendment

In order to state a cognizable claim for wrongful termination in violation of the employee's First Amendment right to speak on a matter of public concern, the complaint must contain allegations of fact that, if proved, would establish certain required elements. First, the complaint must allege facts sufficient to demonstrate that Ms. Huntsinger's alleged speech was actually protected, as a matter of law, by the First Amendment. The threshold question in this protection analysis is whether Ms. Huntsinger's alleged speech can be "'fairly characterized as constituting speech on a matter of public concern.'" *Koch v. City of Hutchinson*, 847 F.2d 1436, 1440 (10th Cir. 1988) (quoting *Rankin v.*

McPherson, 483 U.S. 378, 384, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (further quotations omitted)). Second, the complaint must allege facts sufficient to prove that Ms. Huntsinger's protected speech "was a 'substantial factor' or a 'motivating factor' in the [Authority's] adverse employment decision." *Ballard v. Muskogee Reg. Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001) (quoting *Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)).

"Matters of public concern are those of interest to the community, whether for social, political or other reasons." *Dill,* 155 F.3d at 1201. For instance, "while speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern . . .,'speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests.'" *Finn v. New Mexico*, 249 F.3d 1241, 1247 (10th Cir. 2001) (quoting *Conaway v. Smith,* 853 F.2d 789, 797 (10th Cir. 1988) (emphasis added) (further citations omitted)). The essential question, therefore, is "'whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 247 (4th Cir. 1999) (quoting *Berger v.* Battaglia, 779 F.2d 992, 999 (4th Cir.1985) (internal quotation marks omitted)). In performing this inquiry, we must consider "the content, form and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

The district court concluded for two reasons that Ms. Huntsinger's complaint did not state a cognizable claim that her alleged speech qualified as speech on a matter of public concern that was protected by the First Amendment. First, the district court concluded that, taken as a whole, the complaint demonstrates that Ms. Huntsinger's speech was motivated by primarily personal interests. Second, the district court concluded, in substance, that the complaint contained no allegations of corruption or ineptitude on the part of the Authority that would warrant protection of the speech in question. Upon de novo review, we agree with the district court and add the following reasoning:[4]

Beginning with Ms. Huntsinger's first call to Hill on September 1, it is clear that her stated purpose was personal. The complaint shows that instead of following the requirements of the Authority's personnel policies and simply informing Authority executives about her perceived conflict of interest with Hill, so that they could investigate and handle it according to Authority protocol, she took it upon herself to call Hill. In that call, she suggested that a conflict might exist

---

[4] In so doing, we reject Ms. Huntsinger's contention that the district court "misapplied the standard of review," failing to give her the benefit of all reasonable inferences. Appellant's Br. at 10-11. The district court specifically stated that Ms. Huntsinger's speech failed to qualify for First Amendment protection, "even assuming all the well-pleaded allegations of Ms. Huntsinger's complaint are true, and giving her the benefit of all reasonable inferences that may be drawn from such allegations." Order at 10, App. at 150. Regardless of whether Ms. Huntsinger agrees or disagrees with the district court's ultimate conclusions, the court clearly applied the appropriate standards.

with respect to how Hill's bid might be treated by the Authority (without sufficiently alleging how her position within the Authority or her job duties would actually create such a conflict), and proposed, at that time, only one way to resolve the "conflict," i.e, early retirement of the Note. The complaint does not allege that Ms. Huntsinger, at any time during this initial conversation with Hill, ever proposed another method of resolving the perceived conflict, such as disclosure and/or her own removal from the bid process. Furthermore, Ms. Huntsinger's call to Hill was not to the person at Hill actually responsible for the bid on Segment IV, but was instead to the Vice President of Human Resources, the same person who drafted her husband's separation agreement, which included the Note.

Even after she finally informed her supervisors at the Authority of the situation, she did not seek their guidance on whether a conflict actually existed, explore alternative solutions or request instructions on how to proceed in the event there was an actual conflict, or even consider whether the matter should be left to higher level Authority executives to investigate and resolve the conflict as they saw fit. Rather, she informed them of what she had already done, and urged them to resolve what she saw as a conflict only through early retirement of the Note. She also continued to have personal, direct and unauthorized contact with Hill representatives. As indicated above, the factual recitations in the complaint, taken as a whole, demonstrate that Ms. Huntsinger was not focused on resolving a potential conflict for the benefit of the public good and the good of the Agency, but was intent on resolving her conflict solely in a way which served her personal interests.

In response, Ms. Huntsinger contends that the issue is one of motive, and that questions regarding her motive cannot be resolved on a motion to dismiss. She argues that "establishing motive nearly always requires extensive factual and credibility determinations not appropriate for disposition absent the presentation of evidence." Appellant's Br. at 11. But, that is not the decisive issue in this case. The question of whether or not speech touches upon a matter of public concern is a question of law, *Dill*, 155 F.3d at 1202, and the motive aspects of this inquiry can be resolved without evidence, on a motion to dismiss, where, as here, plaintiff can prove no facts to establish that her motive for speaking was other than personal. See *Witt v. Roadway Exp.*, 136 F.3d 1424, 1431 (10th Cir. 1998) (dismissal under Rule 12(b)(6) appropriate where "it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief") (internal quotations omitted).

Ms. Huntsinger also contends that her speech was not motivated solely by personal interest, but that she spoke with a "'broader public purpose.'" Appellant's Br. at 17 (quoting *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)). Relying on *Jandro v. Foster*, 53 F. Supp. 2d 1088 (D. Colo. 1999) and *Finn*, 249 F.3d 1241, Ms. Huntsinger argues that her speech was motivated at least partially by a desire to "speak on an issue of public concern, equivalent to the legitimate concerns of other members of the public, regarding the operations of the government." Appellant's Br. at 16. We are not persuaded. As already discussed, we conclude that Ms. Huntsinger's complaint, taken as a whole, demonstrates that her speech related solely to her personal interests. Her case is not at all like Jandro and Finn, where it was determined that the plaintiffs had a mixed motive, speaking on

personal matters as well as matters which qualified under the law as matters of public interest deserving of First Amendment protection.[5]

It is significant that Ms. Huntsinger's complaint is entirely devoid of any allegations of corruption or malfeasance on the part of the Authority that would entitle her speech to protection under the First Amendment.[6] Although the purpose of her third communication was to inform Mr.

---

[5] *See Finn*, 249 F.3d at 1248 (noting that although "many portions of plaintiff's speech dealt with matters of purely personal interest," they also "sought to expose the allegedly illegal nature of the Department's reorganization, the lack of integrity and qualifications of the Department's management, ineptitude of the Department's management, loss of Department funds due to management's poor decision-making, and the impact of [a manager's] alleged affair with a subordinate on his decision to promote that subordinate"); *Jandro*, 53 F. Supp. 2d at 1096 ("The allegations of plaintiff's complaint create an inference that plaintiff was motivated, at least in part, by a desire to vindicate his wife's personal interests; however, an inference can be drawn that plaintiff was also motivated by a concern similar to that shared by other citizens. . . .").

[6] In response to questions at oral argument, counsel for Ms. Huntsinger suggested for the first time that Ms. Huntsinger's speech was intended to uncover general corruption within the Authority, insinuating, perhaps, that the Authority engaged in a general practice of mishandling conflicts of interest. However, her complaint contains no allegations to support such a theory. *See, e.g., Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 960 (10th Cir. 2001) ("It is generally unacceptable for a court to [look beyond the four corners of the complaint] when deciding a Rule 12(b)(6) motion to dismiss").

Hogan of the perceived conflict and to propose action for its resolution, the purpose of the fifth communication was to inform Mr. Hogan that she would refrain from working on Segment IV proposals until after the perceived conflict was resolved, and the purpose of her sixth communication was to follow up with the Authority's outside counsel regarding whether there had been any further communications with Hill or any further action taken on the Note. She never once alleged in any of her communications that the Authority ever urged her to drop the issue, refused to address the matter, attempted to cover-up or avoid the perceived conflict, acted to improperly benefit from her perceived conflict with Hill, had a history of corrupt practices relating to this kind of alleged conflict, or otherwise acted with malfeasance or ineptitude in violation of the public trust or Authority policies. Cf. *Gardetto v. Mason*, 100 F.3d at 812-15 (holding that speech motivated primarily by the speaker's personal interest "in maintaining her staff," or involving matters related to "internal budgetary decisions" did not qualify for first amendment protection, but that speech involving the "electoral process," the "integrity, qualifications, and misrepresentations of a highly visible public official," the general "expenditures of public funds," or the "overall management of the public institution" was protected); *Withiam v. Baptist Health Care of Okla.*, 98 F.3d 581, 583 (10th Cir. 1996) (holding that speech that "offered nothing at all to inform the public about the management of the [public] hospital" and that did not expose "government ineptitude, waste or corruption" did not qualify for First Amendment protection).

Indeed, the factual allegations contained in Ms. Huntsinger's complaint show that the Authority did not have

a pattern of mishandling or ignoring potential conflicts. Ms. Huntsinger alleges that the letter she drafted for Mr. Hogan's signature on September 8 was modeled after a letter he sent in a similar situation, suggesting that he had taken affirmative action in the past to address potential conflicts where they actually arose and where such action was deemed an appropriate remedy. Likewise, she alleges that the Authority sent the October 23 letter to all Segment IV bid teams explaining the employee's unauthorized contact with a bidder and assuring the bid participants that the situation would not inappropriately influence the decision-making process, demonstrating that the Authority was ready, willing and able to address conflicts if and when they arose.

Having read the complaint as a whole, it is apparent that Ms. Huntsinger's complaint is not with the Authority's handling of conflicts in general, but with the way the Authority handled her personal situation, because they did not resolve it in the particular manner she desired. We infer from the allegations in the complaint that it was not until this lawsuit, which naturally occurred only after she had been terminated, that Ms. Huntsinger ever spoke out publicly about any supposed problems within the Authority, or ever criticized or questioned the way in which the Authority was handling potential conflicts.[7]

---

[7] On appeal, Ms. Huntsinger notes that "one need not speak publically in order to receive First Amendment protection," suggesting that we may not consider the private nature of her speech to preclude First Amendment protection. Appellant's Br. at 15. We disagree. Although private speech may, in an appropriate circumstance, qualify as protected speech, see *Conaway*, 853 F.2d at 797, we may nonetheless consider the private versus public

In defense of the omissions in her complaint, Ms. Huntsinger asserts on appeal that although there was no actual corruption or misapplication of funds in this particular case, she was acting "early in the process to avoid the perception that a breach of public trust had been committed." Appellant's Br. at 22. She essentially argues that the law should be extended to protect not only speech relating to active government misconduct, but also to speech made as a supposed preemptive strike against possible misconduct. She cites no controlling authority for this proposition, however, and we reject it as presented here.

In sum, Ms. Huntsinger's complaint does not allege speech on a matter of public concern because her alleged speech did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government," *Wilson v. City of Littleton*, 732 F.2d 765, 768 (10th Cir. 1984), and provided nothing to the "free and unhindered debate on matters of public importance," *Pickering v. Board of Ed.*, 391 U.S. 563, 573, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Accordingly, on de novo review of the complaint we conclude, as did the district court, that Ms. Huntsinger's allegations do not make out a First Amendment claim upon which relief can be granted.

---

nature of the alleged speech as a non-dispostive factor in concluding that the plaintiff was not speaking on a matter of public concern and that her speech is therefore not entitled to protection under the First Amendment.

B. Substantive Due Process

In order to state a cognizable claim that the Authority violated Ms. Huntsinger's liberty interest, the complaint must contain allegations of fact that, if proved, would establish that "'[the Authority] took action to terminate [Ms. Huntsinger] based upon a public statement of unfounded charges of dishonesty or immorality that might seriously damage [Ms. Huntsinger's] standing or associations in the community and foreclose [her] freedom to take advantage of future employment opportunities.'" *Garcia v. City of Albuquerque,* 232 F.3d 760, 771 (10th Cir. 2000) (quoting *Palmer v. City of Monticello*, 31 F.3d 1499, 1503 (10th Cir. 1994) (internal quotations omitted)) (emphasis added). Specifically, the complaint must contain allegations sufficient to prove that "'(i) the defendant made a statement impugning [the employee's] good name, reputation, honor or integrity[,] (2) the statement was false[,] (3) the defendant made the statement in the course of the termination proceedings or the statement foreclosed future employment opportunities[,] and (4) the statement was published.'" *Id.* 232 F.3d at 772 (quoting *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 526 (10th Cir. 1998)).

In dismissing Ms. Huntsinger's Substantive Due Process claim, the district court adopted the conclusions of the magistrate judge, finding that Ms. Huntsinger's complaint did not allege sufficient facts as to the first two required elements, i.e., that the statements made in the October 23 letter "are false or that, if false, they directly attack plaintiff's character and reputation." Recommendation of Magistrate Judge at 11, App. at 105; Order at 4, App. at 144. With regard to the truth or falsity of the October 23 letter, the court concluded as

follows:

> [T]he court finds that plaintiff has not demonstrated that the statements in the letter are false. The letter simply recites the facts that the Authority did not authorize the contact plaintiff had with Hill, that an employee requested that the team member pay the debt owed to the employee's spouse and that the employee had not been involved in the review of Segment IV statements of qualification. *See* Comp. P 28. Plaintiff does not allege that these events did not occur. Indeed, plaintiff further avers in her complaint that she drafted a letter for the use of the Authority's executive director to Hill's chief financial officer, in which plaintiff requested that the note be retired to avoid any potential conflict of interest.

Recommendations of Magistrate Judge at 10, App. at 104. With regard to whether the October 23 letter tainted Ms. Huntsinger's good name and/or reputation, the court made the following findings:

> Plaintiff also fails to set forth facts alleging that the letter impugned her good name, reputation or integrity. The letter does not identify plaintiff and does not accuse her of anything other than an unauthorized contact. Plaintiff affirmatively pleads that she contacted Hill and others with respect to the promissory note. Plaintiff has not alleged facts to

> demonstrate that the letter has harmed her reputation in the community.

Id. at 10-11, App. at 104-05. Upon de novo review of the complaint we agree with these conclusions of the district court. We further point out that (i) Ms. Huntsinger avers in her complaint that she indeed contacted Hill prior to receiving authorization from her supervisors at the Authority, (ii) nothing in the complaint or the letter itself alleges that Ms. Huntsinger engaged in any act of dishonesty or immorality, (iii) Ms. Huntsinger's complaint does not allege that Ms. Huntsinger actually sought and was denied employment with any of the companies to whom the letter was sent. Accordingly, we conclude, as did the district court, that the allegations in Ms. Huntsinger's complaint, taken as a whole, do not make out a Substantive Due Process claim upon which relief can be granted.

II.

As indicated above, after the district court dismissed Ms. Huntsinger's federal claims, it declined to retain supplemental jurisdiction over her state law claims, dismissing them without prejudice. Such a dismissal is within the discretion of the district court under 28 U.S.C. § 1367(c)(3). *See also Bauchman v. West High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 644 (10th Cir. 1987).

On appeal, Ms. Huntsinger asserts that the district court abused its discretion because "discovery had essentially been completed on the breach of contract . . . claims." Appellant's Br. at 27. She argues that "the court essentially forces the parties to duplicate substantial effort in the state court," and that this is a "very inefficient and wasteful method of resolving disputes." *Id.* at 27-28.

Although "the nature and extent of pretrial proceedings, judicial economy, convenience, and fairness" may be relevant in deciding whether or not to exercise supplemental jurisdiction, *Thatcher Enter. v. Cache County. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990), nothing prevents the parties in this case from agreeing to utilize any discovery already obtained in any future state court proceeding. *See Harrison v. Landmark Comm. Pub. of Tenn., Inc.*, 892 F. Supp. 199, 201 (E.D. Tenn. 1995). Furthermore, this is not a case where the parties had completed all necessary pre-trial proceedings, or actually tried their case to a jury. *See Tonkovich v. Kansas Bd. of Regents*, 254 F.3d 941, 945 (10th Cir. 2001) (finding no abuse of discretion "given the relative lack of pretrial proceedings"). Cf. *Jones v. Intermt. Pwr. Proj.*, 794 F.2d 546, 549 (10th Cir. 1986), overruled on other grounds by *Yellow Freight Sys., Inc. v. Donnelly,* 494 U.S. 820, 822, 108 L. Ed. 2d 834, 110 S. Ct. 1566 (1990) (holding that once trial has been held, "this court will order dismissal of a pendent claim . . . only when the federal cause of action was so insubstantial and devoid of merit that there was no federal jurisdiction to hear it"). On these facts, we cannot conclude that the district court abused its discretion by dismissing the state law claims without prejudice.

CONCLUSION

For the reasons set forth above, the judgment of dismissal is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed April 2, 2001]

Civil Case No. 99-S-260

EVA B. HUNTSINGER,
Plaintiff,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Defendant.

ORDER

This matter comes before the Court on the August 29, 1999 Recommendation of United States Magistrate Judge Patricia A. Coan ("Recommendation"), and Plaintiff's Objections to Recommendation of Magistrate Judge ("Objections"). The Magistrate Judge recommended dismissal of Plaintiff Eva B. Huntsinger's ("Ms. Huntsinger") first and second claims for relief alleging pursuant to 42 U.S.C. § 1983 violation of Ms. Huntsinger's First Amendment and substantive due process rights respectively.

BACKGROUND

This matter relates to Ms. Huntsinger's discharge from employment for telephone calls and other communications she initiated in September 1998. At the time of her 1998 discharge, Ms. Huntsinger was employed by the E-470 Public Highway Authority ("Authority"). The Authority was, in the fall of 1998, involved in the process of evaluating proposals for the design, finance and construction of Segment IV ("Segment IV") of the E-470 highway. Ms. Huntsinger was a special projects manager with significant responsibilities concerning Segment IV. Ms. Huntsinger was also subject to various policies and provisions barring her from engaging in activities or enterprises that might constitute a conflict of interest.

During the course of her work, Ms. Huntsinger learned that CH2M Hill Companies, Ltd. ("Hill Co.") was a member of one of the teams bidding to work on Segment IV. Hill Co. had previously employed both Ms. Huntsinger and her husband Thomas J. Huntsinger ("Mr. Huntsinger"). At the time Mr. Huntsinger resigned from his executive position with Hill Co., he exchanged his stock in the company for a promissory note in the face amount of $296,000 ("Note"). Although the Note permitted early payment, approximately $270,000 was still due and owing as of the filing of Ms. Huntsinger's Complaint.

Upon learning, on or about September 1, 1998, of Hill Co.'s participation in the bidding on Segment IV, Ms. Huntsinger had two telephone calls with an executive of Hill Co., in which Ms. Huntsinger sought to determine whether action could be taken with regard to the Note to remove what

Ms. Huntsinger regarded as the potential for a conflict of interest. Then on September 8, Ms. Huntsinger advised the Authority's Executive Director, both in person and in writing, of the potential conflict of interest. (Ms. Huntsinger had previously discussed the matter with the Authority's outside attorney on September 1, but September 8 was the earliest she was able to personally speak with the Authority's Executive Director.) Ms. Huntsinger also prepared and on September 8, submitted to the Authority a proposed letter under which the Authority would ask Hill Co. to retire the Note to avoid any potential conflict of interest. The proposed letter was never sent by the Authority to Hill Co.

Later on September 8, Ms. Huntsinger received a facsimile letter from Hill Co.'s general counsel making certain suggestions and containing certain representations with which Ms. Huntsinger disagreed. In response, Ms. Huntsinger left two voice mail messages for Hill Co.'s general counsel in which she sought to clarify the situation. Ms. Huntsinger further wrote Hill Co.'s general counsel stating that her "sole intent ... [was] to avoid any perceived conflict of interest relative to CH2M Hill and [her]" and to look "for suggestions by which we and CH2M Hill can resolve the issue at hand." Ms. Huntsinger included as an enclosure to her letter to Hill Co.'s general counsel a copy of her September 8 letter to the Authority's Executive Director reiterating the potential conflict and stating her intent to continue to recuse herself from the selection process for any work related to Hill Co. Thereafter and continuing until she was given a notice of termination on October 8, there were no further communications between Ms. Huntsinger and either Hill Co. or the Authority on this subject. By letter dated October 14, the Authority notified Ms. Huntsinger that the

basis for her termination was her violation of the Authority's personnel policies regarding conflicts of interest.

Ms. Huntsinger's Complaint was filed February 9, 1999, and the Authority's post-Answer, Motion for Partial Dismissal followed on April 20, 1999. The Recommendation of the Magistrate Judge with respect to that motion was issued August 26, 1999, and Ms. Huntsinger's Objections were filed September 7, 1999.

DISCUSSION

I. Scope of Review of the Magistrate Judge's Recommendation.

As a preliminary matter, Ms. Huntsinger's Objections, by their own language on page one, "concern only" dismissal of Ms. Huntsinger's section 1983 claim for violation of her rights pursuant to the First Amendment. Ms. Huntsinger rests on her opposition brief regarding her section 1983 claim based on denial of substantive due process." *Id.* Pursuant to Fed. R. Civ. P. 72(b), a party may serve and file "specific written objections to the proposed findings and recommendations" within ten days after being served with a copy of the proposed findings and recommendation. The Court then must make a de novo determination of any portion of the magistrate judge's disposition "to which specific written objection has been made in accordance with this rule." *Id.* In this case, Ms. Huntsinger made no specific written objection to that portion of the Recommendation that related to her due process claim as set forth in her Complaint's second claim for relief. Ms. Huntsinger is therefore not entitled to de novo review of that portion of the

Recommendation. There being no clear error on the face of the record, the Recommendation that Ms. Huntsinger's substantive due process claim be dismissed will be accepted.

II. Motion to Dismiss Standards.

That portion of the Recommendation to which specific written objections were made in a timely manner is reviewed de novo pursuant to Fed. R. Civ. P. 72(b). In conducting a review of the sufficiency of a complaint to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff. *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). Dismissal is appropriate only if the plaintiff can prove no set of facts to support a claim for relief. *Id.* However, counsel may not overcome pleading deficiencies with arguments that extend beyond the allegations contained in the complaint. *Bauchman v. West High School*, 132 F.3d 542, 550 (10th Cir. 1997).

III. The Sufficiency of Ms. Huntsinger's First Amendment Claim.

In reviewing a public employee's claim that her discharge was in retaliation for exercising her First Amendment rights, the Court applies principles articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). These principles have variously been described as involving a two step process, *Conaway v. Smith*, 853 F.2d 789, 795 (10th Cir. 1988), or a four step process, *Gardetto v. Mason*, 100 F;3d 803, 811 (10th Cir. 1996), but the underlying analysis is the

same in both. The first issue, and the only one directly addressed by the Authority's Motion for Partial Dismissal, is whether the speech in question can be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U.S. at 461. Expressed somewhat differently, "[t]he threshold question in assessing the free speech claim of a discharged... governmental employee is whether the employee has spoken 'as a citizen upon matters of public concern' or merely 'as an employee upon matters only of personal interest.'" *Gardetto*, 100 F.3d at 812, quoting *Connick*, 461 U.S. at 147. The former type of speech is entitled to First Amendment protection while "[s]peech regarding matters of mere personal interest are not subject to protection under the First Amendment." 100 F.3d at 812.

Speech touches on a matter of public concern when it can be "fairly considered as relating to any matter of political, social or other concern to the community." *Connick*, 461 U.S. at 146. "Speech that pertains to a public agency's 'discharging its governmental responsibilities' ordinarily will be regarded as speech on a matter of public concern." *David*, 101 F.3d at 1355. Similarly, expression that is calculated to disclose "corruption, impropriety, or other malfeasance" on the part of government officials generally constitutes a matter of public concern." *Conaway*, 853 F.2d at 796. In contrast, "speech that pertains only to personal disputes and grievances" is not constitutionally protected. *Jandro v. Foster*, 53 F.Supp.2d 1088, 1095 (D. Colo. 1999).

In determining whether speech is a matter of public concern, the Court must consider the "content, form, and context of a given statement." *Connick*, 461 U.S. at 147-48. In this connection, it is pertinent whether Ms. Huntsinger

spoke as citizen or as an employee. *See Schalk v. Gallemore*, 906 F.2d 491, 495 (10th Cir. 1990). An individual speaks as a citizen if his speech is based on the same motivation that would compel the public to speak. *Gardetto*, 100 F.3d at 812. On the other hand, speech that occurs during the course of an employee's official duties may weigh against a conclusion that the statements involve matters of public concern. *See Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir. 1988). The motive of the speaker in speaking out is relevant, *see Gardetto*, 100 F.3d at 812, but the question of whether a particular incident of speech relates to a matter of public concern is at all times a question of law rather than fact. *See id.*, at 811. Moreover, the mere fact that a speaker's motive is relevant does not mean, as Ms. Huntsinger's Objections assert, that it is improper to determine a public employee's free speech claim on a motion to dismiss. *See generally Dill v. City of Edmond*, 155 F.3d 1193, 1203, n.4 (10th Cir. 1998) (in some circumstances it may be determined at the 12(b)(6) stage that even speech on a matter of public concern is not constitutionally protected).

Ms. Huntsinger Complaint asserts that the sole intent of her initial communications with Hill Co. was "to avoid any perceived conflict of interest relative to C2M Hill and [her]." In so doing, however, Ms. Huntsinger was not, as amplified upon below, speaking out as a member of the public would speak out, but merely pursuing an issue related to a personal interest. Ms. Huntsinger's Objections assert that under the proper standard of review, it is improper to infer only personal motivations from her conduct, and correctly notes that a mixed motive does not necessarily preclude a finding that certain speech is constitutionally protected. *See Jandro*, 53 F.Supp.2d at 1096. At the same time, however, where an

employee's personal interest predominates over any interest that employee might have as a member of the general public, the speech is not entitled to First Amendment protection. *See McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir.1989).

Relevant to the issue of whether Ms. Huntsinger was speaking out as a member of the public would speak out is the content and form of her statements. *Connick*, 461 U.S. at 147-48. The fact that speech is delivered in public is material. It assists in making the determination whether statements were calculated to disclose wrongdoing, inefficiency or other malfeasance on the part of governmental officials in the conduct of their official duties. *Considine v. Board of County Comm'rs.*, 910 F.2d 695, 700 (10th Cir. 1990). That, in turn, is an indicia of speech involving a matter of public concern. *See id.* As Ms. Huntsinger's Objections correctly note, the fact that Ms. Huntsinger did not "go public," does not necessarily preclude her speech from First Amendment protection. *Paradis v. Montrose Memorial Hosp.*, 157 F.3d 815, 818 (10th Cir. 1998). The Court does not, however, read the Recommendation as imposing a requirement of public comment in order for speech to be constitutionally protected. As required by the case law, the Recommendation merely looks at the forum of the speech as one factor among many.

The Court also does not read the Recommendation as specifically imposing a requirement that an employee speak about malfeasance or improper action by a government agency that employs her in order for the speech to be a matter of public interest. Instead, the Recommendation merely recognizes that under the allegations of her complaint, Ms. Huntsinger's speech was not directly disclosing corruption,

inefficiency, impropriety or other malfeasance on the part of government officials, and therefore did not fall within that safe harbor of cases that recognize such direct disclosures as evidencing speech on a matter of public concern.

In a related vein, Ms. Huntsinger's Objections imply that any disclosure of a perceived conflict of interest is (1) a per se disclosure of a matter of a public concern, or (2) necessarily reflects an intent to prevent malfeasance and thereby always constitutes speech on a matter of public concern. The case law does not support these contentions.

Speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148, n. 8. Thus, while *Gardetto* states, as Ms. Huntsinger asserts, that speech about the use of public funds generally touches upon a matter of public concern, 100 F.3d at 813, the opinion goes on to make additional distinctions. Speech about the allocation of resources that impacts the ultimate mission and purpose of university is a matter of public concern, 100 F.3d at 815, but details of internal budgetary allocations are not. *Id.* at 814. Similarly, complaints framing sexual harassment allegations as personal grievances rather than as a widespread practice affecting the agency's performance of its public responsibilities do not constitute speech on a matter of public concern. *Woodward v. City of Worland*, 977 F.2d 1392, 1403-04 (10th Cir. 1992). This is true even though speech about sexual harassment might well be of public interest and does touch on conduct which is unlawful. Given the foregoing distinctions, the Court acknowledges that disclosure of conflict of interest violations, to the extent such

violations reflect on an alleged breach of the public trust, would generally constitute speech about a matter of public concern. *See United States v. Commerce City*, 112 F.Supp.2d 1079, 1087 (D. Colo. 2000). It does not follow, however, that any speech about a potential conflict of interest relates to a matter of public concern.

Further, "under the law of this Circuit, it is insufficient that the speech relates generally to a subject matter of public importance. Instead the speech must 'sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government.'" *Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999). This requirement applies even when, as was the case in *Lee*, the speech is in the form of a memorandum that was only circulated internally.

Under the specific facts of this case, Ms. Huntsinger's communications, with Hill Co. in particular, about a potential conftict of interest was not sufficiently helpful in evaluating the conduct of govemment so as to constitute speech on a matter of public concern. It was instead speech primarily addressed to a matter of personal interest.

The foregoing conclusion is even further compelled by an examination of the acknowledged substance of Ms. Huntsinger's communications. In her efforts to eliminate a potential conflict of interest, Ms. Huntsinger's communications undisputedly focused primarily on achieving that result through early retirement of Hill Co.'s Note to Mr. Huntsinger. Whether the Note was retired early or not, however, is not even arguably a matter of public concern but purely a matter of personal financial interest. Speech primarily directed to the achievement of early retirement of

the Note is therefore not subject to protection under the First Amendment. This analysis is unaffected by whether early retirement of the Note would or would not be in Ms. Huntsinger's best pecuniary interest as commented upon in her brief in opposition to the Authority's Motion for Partial Dismissal.

Ms. Huntsinger's other objections to the Recommendation basically involve issues of interpretation that do not affect the bottom-line conclusion. Whether Ms. Huntsinger believed the potential conflict of interest was between Hill Co. and the Authority or herself-compare the allegations of paragraphs 14 and 21 of her Complaint-does not change the content and form of her communications, and it is on that content and form that Ms. Huntsinger's claim must be evaluated. Further, even assuming, as Ms. Huntsinger's Objection contends, her speech was not about a specific condition of employment, that does not mean the speech was therefore about a matter of public concern and that she was speaking as citizen rather than as an employee. Finally, the fact that there may be copious statutory and engineering ethics regulations may be helpful in showing that Ms. Huntsinger had reason to be concerned about a potential conflict of interest, but does not make Ms. Huntsinger's speech regarding that issue a matter of public concern. As noted above, conduct constituting sexual harassment is similarly subject to numerous statutory and non-statutory prohibitions, but not every communication disclosing a particular alleged instance of it will be considered speech on a matter of public concem. *See Woodward*, 977 F.2d at 1403-04.

In summary, even assuming all the well-pleaded allegations of Ms. Huntsinger's complaint are true, and giving

her the benefit of all reasonable inferences that may be drawn from such allegations, the content, form and context of Ms. Huntsinger's speech demonstrates that such speech was not on matters of public concern but matters of mere personal interest. As such, her speech is not constitutionally protected. The Recommendation of the Magistrate Judge that Ms. Huntsinger's claim under 42 U.S.C. § 1983 for violation of her First Amendment rights be dismissed is therefore accepted.

IV. Additional State Claims.

Dismissal of Ms. Huntsinger's First Amendment claim under 42 U.S.C. § 1983, in combination with acceptance of the Recommendation that Ms. Huntsinger's substantive due process claim under 42 U.S.C. § 1983 be dismissed, disposes of those claims over which the Court has original jurisdiction. Ms. Huntsinger's only remaining claims for relief set forth state claims for breach of express and implied contract.

Jurisdiction over Ms. Huntsinger's state law claims is conferred by 28 U.S.C. § 1367 which is a codification of the doctrine of supplemental jurisdiction. Supplemental jurisdiction is a statutory invention which supplanted the notions of pendent and ancillary jurisdiction, and was codified as part of the Judicial Improvements Act of 1990. Section 1367 gives jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). That statute states that "[a] district court may decline to exercise supplemental jurisdiction over a claim in subsection (a) if the district court has dismissed all claims

over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Consistent with the foregoing and the dismissal of Ms. Huntsinger's claims over which the Court had original jurisdiction, the Court declines to exercise supplemental jurisdiction with respect to her remaining state tort claims.

The Court now being sufficiently advised, IT IS ORDERED

1. That the Recommendation of United States Magistrate Judge Patricia A. Coan dated August 26, 1999 is ACCEPTED;

2. That the Defendant's Motion for Partial Dismissal is GRANTED and Plaintiff's first and second claims for relief as set forth in her Complaint are hereby DISMISSED WITH PREJUDICE, and

3. That Plaintiff's third and fourth claims for relief as set forth in her Complaint are hereby DISMISSED WITHOUT PREJUDICE, each party to pay her or its own costs.

DONE AND SIGNED this 30th day of March 2001.

/s/ _____
Daniel Sparr
United States District Judge

Case No. 99-S-260

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER signed by Judge Daniel B. Sparr on March 30, 2001, was served pursuant to Rule 5, Fed.R.Civ.P., on April 2, 2001, by (*) hand delivery; (**) delivery of same to their respective Court pick-up box; (***)depositing the same in the United States mails, postage prepaid, to the following:

Sander N. Karp, Esq. ***
Leavenworth & Tester, PC
1011 Grand Avenue
P.O. Box 2030
Glenwood Springs, CO 81602

Walter V. Siebert, Esq. **
Heather Fox Vickles, Esq.
Sherman & Howard LLC
DC BOX 12

T. Edward Icenogle, Esq.
*** Edward J. Blieszner, Esq.
Icenogle, Norton & Seter, PC
821 - 17th Street, Suite 600
Denver, CO 80202

Magistrate Judge Patricia A. Coan

/s/ _____
Secretary/Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed April 12, 2001]

Civil Case No. 99-S-260

EVA B. HUNTSINGER,
Plaintiff,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Defendant(s).

JUDGMENT

PURSUANT to and in accordance with the Order accepting the Recommendation of the United States Magistrate Judge entered by the Honorable Daniel B. Sparr, on April 2, 2001, it is

ORDERED that judgment is entered in favor of the Defendant The Board of Directors of the E-470 Public Highway Authority and against the Plaintiff Eva B. Huntsinger. It is

FURTHER ORDERED that this civil action and complaint are dismissed.

DATED at Denver, Colorado, this 12 day of April, 2001.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By _____
Stephen P. Eurlich
Chief Deputy

Case No. 99-S-260

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Judgment was served pursuant to Rule 5, Fed.R.Civ.P., on April 12, 2001, by (*) hand delivery; (**) delivery of same to their respective Court pick-up box; (***) depositing the same in the United States mails, postage prepaid, to the following:

Sander N. Karp, Esq. ***
Leavenworth & Tester, PC
1011 Grand Avenue
P.O. Box 2030
Glenwood Springs, CO 81602

Walter V. Siebert, Esq. **
Heather Fox Vickles, Esq.
Sherman & Howard LLC
DC BOX 12

T. Edward Icenogle, Esq. ***
Edward J. Blieszner, Esq. Icenogle, Norton & Seter, PC
821 - 17th Street, Suite 600 Denver, CO 80202

Magistrate Judge Patricia A. Coan

/s/ _____
Secretary/Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed August 26, 1999]

Civil Action No. 99-S-260

EVA B. HUNTSINGER,
Plaintiff(s),

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Defendant(s).

RECOMMENDATION OF MAGISTRATE JUDGE

Coan, Magistrate Judge

The matters before the court are Defendant's Motion for Partial Dismissal [filed April 12, 1999] and plaintiff's Motion for Leave to File Supplement to Opposition to Motion for Partial Dismissal [filed July 28, 1999]. An Order of Reference under 28 U.S.C. §636(b)(1)(A) and (B) referred this case to the undersigned magistrate judge on April 14, 1999 for pretrial management and recommendation on

disposition of defendant's motion. The motion to dismiss was fully briefed and a hearing was held on May 25, 1999. Plaintiff moved to supplement her response to the Motion on July 28, 1999.

I. Background

Plaintiff, a professional civil engineer, was first employed by the defendant Authority as manager of facilities engineering on February 5, 1996. At the time of her termination, effective December 15, 1998, plaintiff was a special projects manager, whose work included some aspects of the design, clearance, permitting and construction of Segment IV of the E-470 highway ('Segment IV"). For some time before and at the time of plaintiffs termination, various entities presented proposals for the design, financing and construction of Segment IV.

Plaintiff is married to Thomas Huntsinger. Mr. Huntsinger was formerly employed by CH2M Hill ("Hill") as executive president. Plaintiff also was previously employed by Hill. Hill was a part of one of the proposing teams for Segment IV. Mr. Huntsigner resigned from Hill in February 1998. At that time, his stock in the company was transferred into a promissory note with a face value of $296,000. At thetime the complaint was filed, Hill owed Mr. Huntsinger $270,000 on the note.

Plaintiff alleges that when she learned Hill was one of the entities bidding on the Segment IV project, she became concerned that the promissory note potentially created a conflict of interest between the Authority and Hill. Comp.

¶¶11-14. Plaintiff contacted Hill and the Authority's outside attorney to discuss retiring the note. She alleges the Authority's outside attorney advised her she had used the correct approach, but Hill's general counsel contended that plaintiff had threatened Hill by plaintiff's statement that "the conflict could result in CHRM Hill being removed from the selection process." *Id,* ¶¶16, 19. Hill's general counsel advised plaintiff that her husband should request retiring the note at the next Hill Directors' meeting, *Id,* ¶19. Plaintiff alleges she then tried to communicate with Hills' general counsel to correct what she perceived were errors in his correspondence to her. Id, ¶20. Plaintiff stated she would continue to recuse herself from the selection process for any work related to Hill. *Id*, 21.

Plaintiff received a notice of termination on October 8, 1998 (*Id*, ¶23); and, when told she would be terminated October 14, 1998, she was advised the reason for termination was for violating four provisions of the Authority's personnel policies. *Id,* ¶25. The Authority held a pre-termination hearing and the termination was upheld on November 23, 1998. A post-termination hearing was held before the Authority's executive director who, on January 8, 1999, affirmed the decision to terminate. *Id*, ¶27. Plaintiff maintains that after she was terminated, the Authority sent a letter ("the October 23, 1998 letter") to all entities submitting proposals for Segment IV which stated:

> This letter is to advise you of a situation which has occurred in connection with the Authority's Segment IV procurement. There has been an unauthorized contact by an

> Authority employee with one member of a team responding to the Authority's Segment IV Request for Qualification by stating its qualifications to propose on the finance/design/build of Segment IV of E470.
>
> An employee of the Authority, who may have been considered for a minor role in reviewing segment IV proposals, contacted one of the Segment IV respondents and requested that, in order to resolve a perceived conflict of interest, one of the members of the responding team pay a debt owed, but not yet due, to the employee's spouse.
>
> The Authority has conducted a thorough investigation of this matter. The Authority assures you that this employee has not been involved in any review of Segment IV proposals or in the administration of the contract, if awarded. The Authority wishes to further state all of its staff and consultants will be instructed that no proposer is to be favored or disfavored by the Authority as a result of that employee's unauthorized contact or any consequences of that contact.

Comp. ¶28.

Plaintiff asserts claims against defendant Authority under 42 U.S.C. §1983 for violations of her First Amendment right to freedom of speech and for deprivation of substantive

due process under the Fourteenth Amendment, as well as breach of express and implied contracts. She argues that her actions in trying to resolve the potential conflict of interest were protected by the First Amendment's guarantee of free speech. *Id*, ¶ 31, 33. Plaintiff maintains that the letter sent to Segment IV bidders defamed her, injuring her professional and personal reputation, which she contends is a liberty interest protected by the First Amendment to the United States Constitution. *Id* ¶¶28, 31, 39. Plaintiff seeks lost past and future wages and damages for humilation, embarassment and loss of reputation, punitive damages, and attorney fees and costs.

II. Standard of Review

Defendant moves to dismiss plaintiffs First Amended Complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. On a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the court must accept as true well-pleaded factual allegations. *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10th Cir. 1995). All reasonable inferences must be resolved in plaintiffs favor. *Bauchman v. West High School,* 132 F.3d 542, 550 (10th Cir. 1997) (internal citations omitted). Dismissal is appropriate only if "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-4.6 (1957); *see, also, Ramirez v. Oklahoma Dep't of Mental Health,* 41 F.3d 584, 586 (10th Cir. 1994).

III. Legal Analysis

A. §1983 First Amendment Freedom of Speech

Plaintiff claims that defendant discharged her in retaliation for plaintiff's exercise of her right of freedom of speech protected by the First Amendment. "It is clearly established that a State may not discharge an employee on a basis that infringes upon that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson,* 483 U.S. 378, 383 (1987); *see also, Childers v. Independent School District No. 1 of Byron County,* 878 F.2d 1338, 1342 (10th Cir. 1982). To state a claim for unlawful retaliatory discharge based on the exercise of the constitutionally protected right to freedom of speech, a plaintiff must allege facts to show that (1) the speech is protected under the First Amendment and (2) the speech was a substantial or motivating factor in the employer's decision to terminate plaintiff's employment. *Conaway v. Smith,* 853 F.2d 789, 795 (10th Cir. 1988)(citing *Mt. Healthy City School District Board of Education v. Doyle, 429* U.S. 274, 287 (1977)). If the plaintiff makes the requisite showing, the burden shifts to the employer to demonstrate that it would have taken the same action against the employee in the absence of the protected speech. *Gardetto v. Mason,* 100 F.3d 803, 811 (10th Cir. 1996). The first prong of the inquiry may be determined as a matter of law, while the second prong raises factual issues. *Id.*

A public employee's speech warrants constitutional protection if the speech relates to matters of public concern, *Connick v. Meyers,* 461 U.S. 138,146 (1983), and, if the

interests of the public employee in commenting on matters of public concern outweigh the interest of the government employer "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). If the employee's speech does not touch on a matter of public concern, the court need not engage in the *Pickering* balancing analysis. *Connick,* 461 U.S. at 146.

Speech touches on a matter of public concern when it can be "fairly considered as relating to any matter of political, social or other concern to the community." *Connick,* 461 U.S. at 146. Expression that is calculated to disclose inefficiency, impropriety or other malfeasance on the part of government officials generally constitutes a matter of public concern, in contrast to speech that pertains only to personal disputes and grievances which is not subject to First Amendment protection. *Koch v. Hutchinson,* 847 F.2d 1486, 1445-48 (10th Cir. 1988); *Efickson v. Board of County Commissioners,* 801 F.Supp. 414, 421 (D.Colo. 1992). "In drawing the thin line between a public employee's speech which touches on matters of public concern, and speech from the same employee which only deals with personal employment matters, we have looked to the subjective intent of the speaker." *McEvoy v. Shoemaker,* 882 F.2d 463, 468 (10th Cir. 1989).

In determining whether speech is a matter of public concern, the court must consider the content, form and context of a given statement in light of the record as a whole, *Connick,* 481 U.S. at 147-148. An important factor to be weighed in considering the form and context is whether the

actor speaks as a citizen or as an employee. *Schalk v. Gallemore,* 906 F.2d 491, 495 (10th Cir. 1990). An employee speaks as a citizen if his speech is based on the same motivation that would compel the public to speak. *Gardetto,* 100 F.3d at.812. The fact that the speech at issue occurred during the course of an employee's official duties may weigh against a conclusion that the statements involve matters of public concern. *Considine v. Board of County Commissioners,* 910 F.2d 895, 700 (10th Cir. 1990). Further, although the subject matter of the communication may generally be of public interest, the focus of the public concern inquiry is upon what is actually said. *Connick,* 461 U.S. at 148, n.8; *Wren v. Spurlock,* 798 F.2d 1313, 1318, n.1 (10th Cir. 1986).

Plaintiff alleges that defendant terminated her employment because she was performing her job duties as required by the personnel policies which prohibit conflicts of interest. Plaintiff was attempting to resolve a potential conflict of interest occasioned by her husband as the holder of a promissory note made by a bidder or potential bidder on a portion of the Segment IV project. See Comp. ¶¶15, 19, 20. In an attempt to resolve what she perceived as a potential conflict of interest, plaintiff had contact with a Hill official, two Hill attorneys, and various Authority officials.

Plaintiff contends that the Authority's personnel policies make clear that the issue of conflicts of interest involving Authority engineers is of significant public concern in Colorado. *Id,* ¶31. The conflict of interest policy states

> Conflict of Interest: No Employee shall engage in any activity or enterprise which conflicts

> with the duties as an Authority Employee or with the duties, functions, and responsibilities of the Division in which employed... Any potential or perceived conflict of interest must be reported, in advance, to the Executive Director.

See Comp. ¶12.

In construing the complaint, as the court must, in the light most favorable to the plaintiff, the court finds that plaintiff does allege that she attempted to resolve a potential conflict of interest. The issue is whether her actions rose to the level of constitutionally protected speech.

Plaintiff appears to argue that her protected speech was her acknowledgment that the promissory note could cause a conflict of interest with her and the bidding processes which were part of her job responsibilities, and her subsequent conversations attempting to eliminate the conflict of interest. This argument turns the *Connick* rationale on its head. Plaintiff did not speak to the media, the public or any other person about malfeasance or improper action by the governmental agency that employed her. She merely discussed a personal potential problem with the Authority and one company's representatives. Her actions did not expose government ineptitude, waste or corruption. Plaintiff's concern was about a personal matter as it pertained to the performance of her job duties. Plaintiff was concerned about her husband's promissory note, because it had the potential of becoming a conflict of interest for her in the performance of her job duties which included reviewing various proposals for

the Segment IV project. Her concern was of a purely personal nature. Plaintiff was speaking as an employee with a personal problem concerning the personnel rules, which are conditions of her employment, and not as a concerned citizen. A plaintiff who speaks to others about the conditions of her own employment does not engage in speech which is a matter of public concern. *See, David v. City and County of Denver,* 101 F.3d 1344, 1358 (10th Cir. 1996). The allegations of plaintiffs complaint create an inference that plaintiff was motivated, at least in part, by a desire to vindicate her's and her husband's personal interests. The court thus finds that plaintiff's contacts with Hill, Hill's attorneys and the Authority concerning the promissory note are not protected speech under the First Amendment.

B. § 1983 Liberty Interest

Plaintiff alleges that publication of the October 23, 1998 letter seriously damaged her standing and association in the community and foreclosed her future employment opportunities, thus depriving her of her constitutionally protected liberty interest in employment. Comp. ¶¶28, 3740. Defendant argues that plaintiff's substantive due process/liberty interest claim should be dismissed for the failure to state a claim because plaintiff cannot show that her termination resulted in the publication of information which was false and stigmatizing.

In "[o]rder to present a claim of denial of 'substantive' due process by a discharge for arbitrary or capricious reasons, a liberty or property interest must be present to which the protection of due process can attach." *Brenna v. Southern*

Colorado State College, 589 F.2d 475,476 (10th Cir.1978); *see also Brockert v. Skornicka,* 711 F.2d 1376, 1382-83 (7th Cir.1983); *McGhee v. Draper,* 564 F.2d 902, 912-13 (10th Cir.1977); *Weathers v. West Yuma County School District R-J-I,* 530 F.2d 1335, 1342 (10th Cir. 1976) ("In the absence of a property or liberty interest...the trial court properly refused to consider the merits of appellant's claim of arbitrary and capricious action by the school board.")

A liberty interest is implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). *See also Miller v. City of Mission, Kansas, 705* F.2d 368, 373 (10th Cir.1983).

To make a successful liberty interest deprivation claim, a plaintiff must show that a public employer took "action to terminate an employee based upon public statements of unfounded charges of dishonesty or immorality that might seriously damage the employee's standing or associations in the community and foreclose the employee's freedom to take advantage of future employment opportunities..." *Rusillo v. Scarborough,* 935 F.2d 1167, 1171 (10th Cir. 1991)(quoting *Mellon v. City of Oklahoma City,* 928 F.2d 920, 927 (10th Cir. 1991)(en banc); *see also, Asbill v. Housing Authority of the Choctaw Nation of Oklahoma,* 726 F.2d 1499, 1503 (10th Cir. 1984).[8]

---

[8] The Tenth Circuit has consistently held that in order to show deprivation of a liberty interest under section 1983, plaintiffs must first show that the government's action stigmatized or otherwise damaged their reputations. *See McGhee v. Draper,* 639

Here, plaintiff was told she was discharged for violations of four unspecified personnel rules. Comp. ¶25. The Authority issued an Qctober 23, 1998 letter on or about that date, before plaintiff was officially terminated. According to plaintiff, the letter was sent to all entities submitting proposals for the Segment IV project. *Id,* ¶28. The letter advises that there "has been an unauthorized contact" by an unnamed Authority employee with an unnamed team member bidding on the Segment IV project. *Id.* The letter further said that the employee "requested that...one of the members of the team pay a debt owed, but not yet due, to the employee's spouse." *Id.* The letter does not name the plaintiff, nor indicate that she is under investigation for possible disciplinary action or that she will be terminated. Plaintiff has not argued specifically that the information in the letter is false, but nonetheless asserts that it is stigmatizing or defamatory *per se. See Id,* ¶28.

To prove deprivation of a liberty interest, a plaintiff must show that the statements made (1) impugn her good name, reputation, honor or integrity; (2) are false; (3) occurred in the course of her termination or foreclosed other employment opportunities; and (4) were published. *Watson v. University of Utah Medical* Center, 75 F.3d 569, 579 (10th

---

F.2d 639, 642-43 (10th Cir. 1981). To do so, they must show that the government published false and stigmatizing information about them in connection with the adverse action taken against them. *See Asbill,* 726 F.2d at 1503; *Palmer v. City of Monticello,* 31 F.3d 1499 (10th Cir.1994) (false accusation that police officer had falsified speeding ticket was sufficient to be stigmatizing for purposes of liberty interest claim).

Cir. 1996) (internal citations omitted).

Even considering plaintiff's allegations in the light most favorable to her, the court finds that plaintiff has not demonstrated that the statements in the letter are false. The letter simply recites the facts that the Authority did not authorize the contact plaintiff had with Hill, that an employee requested that the team member pay the debt owed to the employee's spouse and that the employee had not been involved in the review of Segment IV statements of qualification. *See* Comp. ¶28. Plaintiff does not allege that these events did not occur. Indeed, plaintiff further avers in her complaint that she drafted a letter for the use of the Authority's executive director to Hill's chief financial officer, in which plaintiff requested that the note be retired to avoid any potential conflict of interest. *See Id,* ¶17.

Plaintiff also fails to set forth facts alleging that the letter impugned her good name, reputation or integrity. The letter does not identify plaintiff and does not accuse her of anything other than an unauthorized contact. Plaintiff affirmatively pleads that she contacted Hill and others with respect to the promissory note. Plaintiff has not alleged facts to demonstrate that the letter has harmed her reputation in the community. The court thus finds that plaintiff has not shown that the statements made in the October 23, 1999 letter are false or that, if false, they directly attack plaintiff's character and reputation. Accordingly, plaintiff has not stated a claim of denial of substantive due process for deprivation of a liberty interest.

IV. Recommendation

For the reasons stated, it is

ORDERED that Plaintiff's Motion for Leave to File Supplement...[filed July 28, 1999] is granted. The Supplement is to be date stamped and filed this date. It is further

RECOMMENDED that Defendant's Motion for Partial Dismissal [filed April 12, 1999] be granted, and that plaintiff's first and second Claims for relief be dismissed.

IT IS FURTHER ORDERED that, pursuant to Fed. R. Cir. P. 72(b), the parties have ten (10) days after service of this Recommendation to serve and file written, specific objections to the findings of fact, conclusions of law, or recommendations of the Magistrate Judge with the Clerk of the Court. Upon review of the Recommendation, the District Judge need not consider frivolous, conclusive, or general objections. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

A party's failure to file such written specific objections to the findings of fact, conclusions of law and recommendations of the Magistrate Judge as set forth in this document will bar the party from a de novo determination by the District Judge. Additionally, the failure to file written specific objections to the findings of fact, conclusions of law

or recommendations of the United States Magistrate Judge in this Recommendation within ten (10) days after being served with a copy will bar appellate review of the findings of fact, conclusions of law or recommendations of the Magistrate Judge.

Dated August 26, 1999.

By the Court:

/s/ _____
Patricia A. Coan
Magistrate Judge

District Court Recommendation of
Magistrate Judge - 8/26/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Recommendation of Magistrate Judge dated August 26, 1999 was served on August 26, 1999 by: (*) Delivery to; or by (**) Depositing in the United States Mail, postage prepaid, addressed to:

/s/_____
Secretary/Deputy Clerk

David R. Fine, Esq. **
Kelly Haglund Gamsey & Kahn
1441 Eighteenth St., Ste. 300
Denver, CO 80202-1296

Walter V. Siebert, Esq. *
Heather Fox Vickles, Esq.
Sherman & Howard
D.C. Box No. 12

T. Edward Icenogle, Esq. **
Edward J. Bliesner, Esq. **
Icenogle, Norton & Seter, P.C.
5690 DTC Boulevard, Ste. 300
Greenwood Village, CO 80111-3232

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed February 8, 1999]

Civil Action No. 99-S-260

EVA B. HUNTSINGER,
Plaintiff,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Defendant.

COMPLAINT

Eva B. Huntsinger, for her complaint against defendant Board of Directors of the E-470 Public Highway Authority ("Authority"), states as follows:

INTRODUCTION

1. This action arises as a result of the Authority's termination of Ms. Huntsinger in response to her efforts to resolve a potential conflicting interest related to a $300,000,000 contract for which the Authority solicited bids.

The termination violated Ms. Huntsinger's rights under the First Amendment to the United States Constitution, her liberty interest in her employment, and her express and implied contract rights as an employee of the Authority.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § §1331 and 1367.

3. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391 (b).

PARTIES

4. Eva Huntsinger is a resident of unincorporated Arapahoe County, Colorado. She is married to Thomas J. Huntsinger.

5. The Authority is a body corporate and political subdivision of the state of Colorado established in 1987 pursuant to C.R.S. § 43-4-501 *et seq.* The Authority is responsible for the financing, construction and operation of a toll highway designated as E-470, located on the eastern perimeter of the Denver metropolitan area ("the Project").

RELATED NON-PARTIES

6. CH2M Hill Companies, Ltd. ("Hill") is an international engineering and consulting company with headquarters in Greenwood Village, Colorado.

7. T. Edward Icenogle, of the law firm of Ankele, Icenogle, Norton & Seter, is outside counsel for the Authority.

FACTUAL BACKGROUND

8. Ms. Huntsinger has a B.S. in civil engineering, a B.A. in business management, and a Masters in Business Administration and is a professional civil engineer registered in Colorado and other states. Prior to her termination, she was employed by the Authority as a special projects manager, particularly concerning the preliminary design, utility and intergovernmental relations, environmental clearance, permitting and construction of Segment IV of the E-470 highway ("Segment IV"). At the time of her termination, Ms. Huntsinger had been employed by Authority for nearly three years. She was earning approximately $90,000 per year, including benefits. She received nothing but stellar employment evaluations, including one on September 14, 1998. Ms. Huntsinger was given a notice of termination on October 8, 1998.

9. The Authority is presently evaluating proposals for the design, finance and construction of Segment IV of the Project. Hill is part of one of the proposing teams.

10. Ms. Huntsinger worked for Hill from 1985 to 1994.

11. Thomas J. Huntsinger, Ms. Huntsinger's husband, worked for Hill for nearly 25 years before he resigned from Hill in February 1998. His last position at Hill was Executive Vice President. Upon Mr. Huntsinger's departure from Hill, Hill transferred his stock in the company to a promissory note

dated March 20, 1998, in the face amount of approximately $296,000 (the "Note"). The Note provides in part that "at the discretion of the Board of Directors of CH2M Hill Companies, Ltd., any portion of or all such payments [on the Note] may be made sooner [than the schedule set forth in the Note.]" Hill still owes Mr. Huntsinger approximately $270,000 on the Note.

12. The Authority Personnel Policies provide at section 5.12:

> Conflict of Interest: No Employee shall engage in any activity or enterprise which conflicts with the duties as an Authority Employee or with the duties, functions, and responsibilities of the Division in which employed (sic) .... Any potential or perceived conflict of interest must be reported, in advance, to the Executive Director.

13. Ms. Huntsinger had significant responsibilities concerning Segment IV, in (1) management of various aspects of the work preparatory to the submission of proposals by consultants, review of same, and response to inquiries regarding development of Segment IV, and (2) the selection process for future consultants and/or management of the currently contracted Segment IV consultants and contractors for Segment IV.

14. When Ms. Huntsinger learned on or about September 1, 1998 that Hill was a member of one of the teams bidding for Segment IV, she became concerned that the Note from Hill to Mr. Huntsinger potentially created a conflicting

interest between the Authority and Hill.

15. Ms. Huntsinger determined to first call Hill to see whether action could be taken with regard to the Note to remove the potential conflict. To this end, on September 1, 1998, Ms. Huntsinger had two telephone discussions in a period of approximately 30 minutes with Dirk Stauthamer, Vice-President of Human Resources at Hill, and the person responsible for preparing a separation agreement between Mr. Huntsinger and Hill. The talks were friendly and open. While the matter was not resolved in these communications, Mr. Stauthamer gave Ms. Huntsinger no indication that Hill was concerned about the matter.

16. Also, on September 1, Ms. Huntsinger attempted but was not able to reach Stephen D. Hogan, the Authority's executive director at the time. When she could not reach Mr. Hogan, Ms. Huntsinger called Mr. Icenogle (the Authority's outside attorney) approximately fifteen minutes after her first conversation with Mr. Stauthamer, and informed him of her call to Mr. Stauthamer. Mr. Icenogle told Ms. Huntsinger that calling Mr. Stauthamer was the correct approach.

17. Ms. Huntsinger informed Mr. Hogan of the potential conflicting interest on September 8, 1998, the first date she was able to speak with him personally. Also on September 8, Ms. Huntsinger presented Mr. Hogan with a draft of a letter she had written, for Mr. Hogan's signature, to the chief financial officer of Hill, pursuant to which Mr. Hogan would ask Hill to retire the Note to avoid any potential conflict of interest. Ms. Huntsinger modeled this draft letter after a similar letter that Mr. Hogan had signed on behalf of

another Authority employee under similar circumstances. Mr. Hogan told Ms. Huntsinger that he had no problem with her approach, but he first wanted to fax the draft to Mr. Icenogle for his review. The draft was faxed to Mr. Icenogle. Mr. Hogan never signed or sent the letter to Hill. Mr. Hogan resigned from the Authority to become the executive director of the Northwest Parkway Authority effective September 14, 1998.

18. On September 8, Mr. Icenogle called Ms. Huntsinger at the Authority and upbraided her for allegedly neglecting to inform Mr. Hogan, the executive director, of the matter (even though Ms. Huntsinger had just so informed Mr. Hogan on September 8 and had previously informed Mr. Icenogle as well on September 1).

19. Hill's general counsel, Wyatt McCallie, wrote Ms. and Mr. Huntsinger by facsimile on the evening of September 8. In that facsimile letter, Mr. McCallie erroneously stated that Ms. Huntsinger told Mr. Stauthamer that "the conflict could result in CH2M Hill being removed from the selection process." He went on to suggest that Mr. Huntsinger submit a written request for prepayment of the Note to Hill's Board of Directors prior to its next board meeting. He also stated that "the note is free to be sold to a bank or any other party." Ms. Huntsinger subsequently learned that selling or assigning the Note was not a viable option.

20. Ms. Huntsinger did two things in response to Mr. McCallie's September 8 facsimile evening correspondence. First she left two voice mail messages for Mr. McCallie describing the errors in his September 9

correspondence and briefly tried to clarify the situation. Next, she provided Mr. McCallie on September 9 a letter describing (contrary to his characterization of her efforts) that her "sole intent ... [was] to avoid any perceived conflict of interest relative to CH2M Hill and [her]" and to look "for suggestions by which we and CH2M Hill can resolve the issue at hand."

21. On September 8, Ms. Huntsinger also wrote to Mr. Hogan (still the Authority's executive director) to reiterate the potential conflict. Ms. Huntsinger reiterated that she would continue to recuse herself from the selection process for any work related to Hill.

22. Ms. Huntsinger enclosed a copy of the September 8 letter to Hogan with the aforementioned September 9 letter she sent to Mr. McCallie (the general counsel of Hill).

23. Between September 8, when Ms. Huntsinger wrote Mr. Hogan, and October 8, when she received the notice of termination, neither Mr. Hogan nor anyone else from the Authority told Ms. Huntsinger that her approach to the potential conflict of interest was inappropriate. In fact, on September 14, Ms. Huntsinger received a performance review in which she was deemed to have exceeded job requirements. To Ms. Huntsinger's knowledge, the Authority took no steps to address the issue from September 8 until October 8, when the notice of termination signed by Matthew McDole, the Authority's chief engineer, was left in Ms. Huntsinger's mailbox at the Authority (Mr. McDole had also prepared and signed the September 14 performance review).

24. On October 6, Ms. Huntsinger spoke to Mr. Icenogle, who told her that he had had "informal" communications with Mr. McCallie, Hill's general counsel. When Ms. Huntsinger asked him if he had had any discussions regarding the Note, he responded, "That's a hard question to answer. You'll get your marching orders from Matt McDole." When Ms. Huntsinger immediately raised the matter with Mr. McDole, he said he knew nothing about it.

25. In an October 14, 1998 letter from Mr. Icenogle to Ms. Huntsinger, the Authority purported to fully explicate the basis for her termination. In that letter the Authority claimed that Ms. Huntsinger violated four sections of the Authority's personnel policies. The Authority had no legal or factual basis for this position.

26. Section 10.2 of the applicable Authority procedures provides:

> Disciplinary Actions: Disciplinary actions may include any or all of the following:
>
> Reprimand, Suspension, Demotion, or Dismissal.
>
> The first logical step in any disciplinary process is a discussion of the alleged infractions between Employee and Supervisor. When it is, in fact, determined that an infraction has occurred, depending on the nature of the infraction, usually a reprimand will follow. Suspension or demotion occur when the reprimand is either insufficient, due

> to the nature of the infraction, or ignored, thus causing a recurrence of the same or similar infraction. Dismissal is considered a last resort discipline, one which is extreme and permanent.

No supervisor initiated any discussion with Ms. Huntsinger prior to the Authority determining that an "infraction" had occurred. Once it determined (without input from Ms. Huntsinger) that an infraction had occurred, the Authority neither reprimanded, demoted nor suspended Ms. Huntsinger. Rather, the Authority remained mysteriously silent for over one month before it abruptly fired Ms. Huntsinger.

27. The Authority held a "pre-termination hearing," at which Mr. McDole, who sent the initial termination notice, was the hearing officer. On November 23, Mr. McDole upheld the termination in a one paragraph "decision." A "post-termination" hearing was held before the acting executive director, who affirmed Mr. McDole's decision on January 8, 1999.

28. On information and belief, on October 23, 1998, the Authority sent a letter to all entities submitting proposals regarding Segment IV which stated the following:

> This letter is to advise you of a situation which has occurred in connection with the Authority's Segment IV procurement. There has been an unauthorized contact by an Authority employee with one member of a team responding to the Authority's Segment IV Request for Qualification by stating its

qualifications to propose on the finance/design/build of Segment IV of E-470.

An employee of the Authority, who may have been considered for a minor role in reviewing segment IV proposals, contacted one of the Segment IV respondents and requested that, in order to resolve a perceived conflict of interest, one of the members of the responding team pay a debt owed, but not yet due, to the employee's spouse.

The Authority has conducted a thorough investigation of this matter. The Authority assures you that this employee has not been involved in any review of Segment IV statements of qualification and will not be involved in any future review of Segment IV proposals or in the administration of the contract, if awarded. The Authority wishes to further state all of its staff and consultants will be instructed that no proposer is to be favored or disfavored by the Authority as a result of that employee's unauthorized contact or any consequences of that contact.

This letter is defamatory *per se*.

29. The Authority personnel policies provide:

Section 1.4 Policies and Procedures constitute terms of employment: **The following 'E-470 Public Highway Authority Personnel**

> **Policies and Procedures Manual' (the 'Policies and Procedures') incorporates and contains the terms and provisions which shall govern the employment relationship between the Authority, as Employer, and the Employee. These Policies and Procedures shall remain in effect throughout the employmimt relationship, until termination of employment in accordance herewith.** (Bold in original).

30. Section 2.1 of the personnel policies states that the policies will be used "to ensure uniform, fair, and consistent administration of personnel matters."

31. The Authority's personnel policies, and Colorado statutes and state engineering ethical rules, make clear that the issue of conflicts of interest involving Authority engineers such as Ms. Huntsinger is of significant public concern in Colorado. Ms. Huntsinger fully disclosed to the Authority all facts relevant to her potential conflict of interest resulting from the Note, as required by her employment contract with the Authority, state law and engineering codes. In addition, through her efforts to resolve the conflict, which included investigation of retiring the Note *as called for by the Note* and selling the Note, as suggested by Hill, Ms. Huntsinger gave further notice to the Authority of *Hill's* potential conflict. Ms. Huntsinger's actions in attempting to resolve the potential conflict(s) of interest were protected by the First Amendment to the United States Constitution. In response to Ms. Huntsinger's efforts the Authority, after consultations with Hill, terminated Ms. Huntsinger's employment, in violation of her First Amendment, Fourteenth

Amendment and contract rights. Before taking what even its own personnel policies term the "extreme" action of termination, the Authority did not confer or attempt to resolve the matter with Ms. Huntsinger, thus violating its own policies. After taking such action, the Authority defamed Ms. Huntsinger by sending out the October 23 letter to numerous companies, the number of which will be determined in discovery, with whom Ms. Huntsinger worked for years, and with whom she intended to work in the future, thereby severely damaging her professional and personal reputation.

FIRST CLAIM FOR RELIEF
(First Amendment -- 42 U.S.C. § 1983)

32. Ms. Huntsinger incorporates by references the allegations of paragraphs 1 through 31.

33. By terminating Ms. Huntsinger in retaliation for her efforts to resolve the potential conflict(s) of interest, the Authority violated Ms. Huntsinger's right of free speech under the First Amendment of the United States Constitution.

34. As a result of the Authority's actions, Ms. Huntsinger has suffered lost past and future wages, humiliation, embarrassment, loss of reputation, both professional and personal, and other damages in an amount to be determined at trial.

35. The Authority engaged in the above actions with evil motive or intent, recklessness and/or callous indifference to Ms. Huntsinger's rights, entitling Ms. Huntsinger to an award of punitive damages.

SECOND CLAIM FOR RELIEF
(Substantive Due Process- 42 U.S.C. § 1983)

36. Ms. Huntsinger incorporates by references the allegations of paragraphs 1 through 35.

37. The Authority took action to terminate Ms. Huntsinger based on the October 23, 1998 statement referenced in paragraph 28 above.

38. The October 23 letter seriously damaged Ms. Huntsinger's standing and associations in the community and foreclosed her freedom to take advantage of future employment opportunities.

39. Accordingly, the Authority deprived Ms. Huntsinger of her liberty interest in her employment in violation of the Fourteenth Amendment to the United States Constitution.

40. As a result of the Authority's actions, Ms. Huntsinger has suffered lost past and future wages, humiliation, embarrassment, loss of reputation, both professional and personal, and other damages in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF
(Express Contract)

41. Ms. Huntsinger incorporates by reference the allegations of paragraphs 1 through 40.

42. An employment contract existed between Ms. Huntsinger and the Authority, based on, among other things, the Authority's personnel policies.

43. The personnel policies allow the termination of Ms. Huntsinger's employment only for cause as set forth therein.

44. The Authority terminated Ms. Huntsinger without proper cause.

45. Until terminated, Ms. Huntsinger performed her part of the contract.

46. As a result of the Authority's breach of the employment contract, Ms. Huntsinger has suffered damages, in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF
(Implied Contract)

47. Ms. Huntsinger incorporates by reference the allegations of paragraphs 1 through 46.

48. The Authority's personnel policies set forth policies and procedures regarding the hiring, promotion, discharge and terms and conditions of employment with the Authority.

49. The Authority demonstrated to Ms. Huntsinger a willingness to be bound by such policies and procedures.

50. Ms. Huntsinger was aware of the existence of the personnel policies before she was terminated by the Authority.

51. Ms. Huntsinger reasonably understood that the Authority was offering the personnel policies as part of the terms and conditions of her employment and, with that understanding, she continued her employment with the Authority.

52. The Authority wrongfully terminated Ms. Huntsinger without complying with the personnel policies.

53. Until terminated, Ms. Huntsinger performed her part of the contract.

54. As a result of the Authority's breach of the contract, Ms. Huntsinger has suffered damages in an amount to be determined at trial.

WHEREFORE, Ms. Huntsinger prays that judgment be entered against the Authority and in her favor, and that the Court enter an Order awarding Ms. Huntsinger the following relief:

1. Compensatory damages as allowed by law;

2. Damages for loss of back pay and all other lost benefits of employment plus interest as allowed by law;

3. Punitive damages as allowed by law;

4. Reasonable attorney's fees and costs as allowed by law; and

5. Such other relief as the Court deems appropriate.

JURY DEMAND

Ms. Huntsinger demands trial by jury on all claims so triable.

DATED this 8th day of February, 1999.

KELLY/HAGLUND/GARNSEY & KAHN LLC

/s/ _____

DAVID R. FINE
1441 Eighteenth Street, Suite 300
Denver, Colorado 80202-1296
Telephone: (303) 296-9412

ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

Eva B. Huntsinger
7519 S. Argonne St.
Aurora, CO 80016

Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-407

In The
Supreme Court of the United States

EVA B. HUNTSINGER,

Petitioner,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

EDWARD J. BLIESZNER
Counsel of Record
SARA WAGERS-JOHNSON

ICENOGLE, NORTON, SMITH, BLIESZNER & MILLER, P.C.
821 Seventeenth Street
Suite 600
Denver, Colorado 80202
(303) 292-6400

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is there is a split among the circuit courts of appeal regarding a public employee's freedom of speech rights, or have some opinions merely emphasized different factors established by this Court in determining whether the employee's speech should be protected by the First Amendment to the United States Constitution based on the varying facts of each case?

2. Do statements by a public employee made in an attempt to resolve a perceived issue relating solely to that employee's own job constitute speech concerning potential governmental misfeasance?

3. Did the Tenth Circuit properly affirm the dismissal of a claim which lacked all elements necessary to state a claim for relief?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of Facts	1
Reasons for Denying the Petition	2
I. There is no conflict among the circuit courts of appeal in the manner in which they apply this Court's prior opinions regarding a public employee's rights of free speech as guaranteed by the First Amendment to the United States Constitution	2
II. This Court already has addressed the question of the protection of speech concerning potential wrongdoing and the District Court and the Tenth Circuit Court of Appeals properly determined that Huntsinger's complaint failed to allege any potential governmental misconduct	9
III. The District Court and Tenth Circuit Court of Appeals properly dismissed Huntsinger's substantive due process claim as it lacked several elements necessary to state a claim for relief	11
Conclusion	11

TABLE OF AUTHORITIES

Page

CASES

Belk v. City of Eldon, 228 F.3d 872 (8th Cir. 2000), *certiorari denied*, 532 U.S. 1008, 121 S.Ct. 1734 (2001) 6

Belk v. Town of Minocqua, 858 F.2d 1258 (7th Cir. 1988) 7, 8

Boring v. Buncombe County Board of Education, 136 F.2d 364 (4th Cir. 1998), *certiorari denied*, 525 U.S. 813, 119 S.Ct. 47 (1998) 4, 5

Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614 (1988) 3

Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001), *certiorari denied*, No. 01-1548, 2002 WL 706612 (U.S. Oct. 7, 2002) 4, 5

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983) 2, 3, 8, 9

Farmer v. Cleveland Public Power, 295 F.3d 593 (6th Cir. 2002) 4

Kirkland v. Northside Independent School District, 890 F.2d 794 (5th Cir. 1989), *certiorari denied*, 496 U.S. 926, 110 S.Ct. 2620 (1990) 4, 5

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 7

Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000) 6, 7

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 2, 3, 8, 9

Richardson v. United States, 526 U.S. 813, 119 S.Ct. 1707 (1999) 3

STATEMENT OF FACTS

Eva Huntsinger ("Huntsinger") was employed as an engineer by the E-470 Public Highway Authority, a body corporate and a subdivision of the State of Colorado (the "Authority"). (Pet. at 61a, ¶ 5, 62a, ¶ 8.) Both she and her late husband, Thomas Huntsinger, previously worked for another engineering company, CH2M Hill ("Hill"). (Pet. at 62a, ¶¶ 10, 11.) When Thomas Huntsinger retired, Hill gave him a promissory note in exchange for stock he owned in the company. (Pet. at 62a-63a, ¶ 11.)

Hill was part of a team of contractors and engineers competing for a highway design and construction project to be undertaken by the Authority. (Pet. at 63a-64a, ¶ 14.) When Huntsinger found out that Hill was among the companies attempting to obtain the work, she called Hill directly and discussed early payment of the note payable to her husband. (Pet. at 63a-65a, ¶¶ 14-19.) Huntsinger called Hill before she gave any notice of the situation to the Authority (Pet. at 64a, ¶ 15), and thereby violated the Authority's written policies that any potential or perceived conflict of interest be reported, in advance, to the Authority's Executive Director. (Pet. at 63a, ¶ 12.)

Huntsinger's communications to Hill were such that Hill found it necessary to involve its general counsel, she gave another Hill employee the impression that Hill faced the possibility of being excluded from the selection process and Huntsinger was required to have further communications with Hill to describe "errors" in Hill's correspondence regarding her telephone calls and in an attempt to "clarify the situation." (Pet. at 65a-66a, ¶¶ 19, 20.)

The Authority subsequently terminated Huntsinger for violating the Authority's personnel policies. (Pet. at

67a, ¶ 25.) Such termination did not occur on October 8, 1998, as alleged in the Petition (Pet. at 4), but occurred only after a pre-termination hearing before her immediate supervisor. (Pet. at 68a, ¶ 27.) Ms. Huntsinger further was provided a post-termination hearing before the Authority's then acting Executive Director. (*Id.*)

REASONS FOR DENYING THE PETITION

I. There is no conflict among the circuit courts of appeal in the manner in which they apply this Court's prior opinions regarding a public employee's rights of free speech as guaranteed by the First Amendment to the United States Constitution.

Petitioner, Eva Huntsinger asserts that a conflict exists among the circuit courts of appeal in the manner in which they have applied this Court's holdings on public employees' First Amendment rights. Huntsinger claims that the appellate courts have divided themselves into three distinct camps in the manner in which they determine if a public employee's speech merits First Amendment protection. She describes those camps as those which consider only the content of the speech at issue, those which consider only the role of the speaker and those which look only at the speaker's point or motivation. (Pet. at 13-20.)

There is, however, no "split" among the circuits. This Court, in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), established the principles by which the lower courts are to decide cases involving a public

employee's First Amendment rights. *Connick* sets forth various factors that may be examined in determining "[w]hether an employee's speech addresses a matter of public concern . . . ." *Connick*, 461 U.S. at 147-148, 103 S.Ct. at 1690. Following *Pickering* and *Connick*, appellate courts have considered public employee speech cases arising from a variety of unique factual circumstances. As they have done so, those courts have emphasized different factors from *Connick*, depending on the facts of each case. For example, in some cases the content of the speech may be of such obvious public concern that other *Connick* factors, such as the form and context of the speech, were not as prominent in the analysis of whether the speech merited First Amendment protection. In other cases where the content was more neutral, the role of the speaker and whether he or she was attempting to bring some governmental abuse to the public's attention may have weighed more heavily in the court's decision. The existence of a different emphasis on one factor or another, depending on the facts before the court, does not create a conflict among various courts which would warrant this Court's review.

Huntsinger's authorities fail to demonstrate a true divergence among the circuits such as the split which was present in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614 (1988). In that case, this Court noted that some circuits approved the remand of certain cases, while others disapproved remanding the same types of cases. A true split also was noted in *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707 (1999), where some circuits required a jury's determination of previous criminal violations to be unanimous, while other circuits did not require the jury's decision on that issue to be unanimous.

The same type of inconsistencies are absent in the cases cited by Huntsinger. For example, Huntsinger argues that *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), *certiorari denied*, No. 01-1548, 2002 WL 706612 (U.S. Oct. 7, 2002), demonstrates that the Sixth Circuit looks only at the content of the speech and not the role of the speaker in evaluating the speech at hand. In *Farmer v. Cleveland Public Power*, 295 F.3d 593 (6th Cir. 2002), however, the same circuit court of appeals, in considering the "content, form and context" of the speech, looked at the employee's "purpose or intent" and whether the speech was a "routine matter within the scope of her duties as a CPP employee . . . ." *Id.* at 600, 601. Thus, the Sixth Circuit reviews and applies factors beyond the content of the speech in determining if speech warrants First Amendment protection.

Huntsinger claims that *Boring v. Buncombe County Board of Education*, 136 F.2d 364 (4th Cir. 1998), *certiorari denied*, 525 U.S. 813, 119 S.Ct. 47 (1998), and *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *certiorari denied*, 496 U.S. 926, 110 S.Ct. 2620 (1990), show that those circuits look only at the role of the speaker in evaluating the speech. Those cases, like *Cockrel*, were cases in which a school teacher sought First Amendment protection for certain speech. While the courts in *Kirkland* and *Boring* held that the speech at issue, Boring's selection of a play and Kirkland's distribution of an unauthorized reading list, did not merit First Amendment protection, their focus went beyond the role of the speaker. One of the overriding concerns in those cases was whether an individual teacher or the school board should be given the right to establish the school's curriculum. The courts in those cases found that the better

approach is to favor the school board's decisions and not extend First Amendment protection to a school teacher's choice about the content of the curriculum to be taught in their classrooms. Both *Kirkland* and *Boring*, however, applied various factors of *Connick* in reaching their conclusions.

In *Kirkland*, for example, the court looked to the content of the speech as well as the role of the speaker. That court recognized: "It is well settled that even nontenured public school teachers do not shed first amendment protection in *speaking on matters of public concern*." *Kirkland*, 890 F.2d at 798 (emphasis added). The court noted further, "[i]f the *nature of the speech* is purely private, such as a dispute over one employee's job performance, a nontenured teacher enjoys no first amendment protection as to that speech." *Id.* at 799 (emphasis added).

Similarly in *Boring*, the court noted: "Since plaintiff's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection." *Boring*, 136 F.3d at 369.

The court in *Cockrel* was critical of *Kirkland* and *Boring*, and said that not all speech by a teacher in a classroom lacks First Amendment protection. The *Cockrel*, court, however, overstated the holdings of *Kirkland* and *Boring*. As discussed above, those cases did not hold that *all* speech by a teacher in a classroom is private, as the *Cockrel* court implied. It should be noted also that this Court denied review of *Cockrel*, *Kirkland* and *Boring*.

Huntsinger's argument that the Eighth Circuit "limits its consideration to the speech itself and whether or not it addresses matters of public concern, rather than extending the analysis beyond the content of the speech" (Pet. at 15) also is belied by the very authority cited in support of this proposition. In *Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000), *certiorari denied,* 532 U.S. 1008, 121 S.Ct. 1734 (2001), the court applied what it termed the "Connick Analysis" which it noted as requiring an examination of the "content, form and context of the speech as revealed by the entire record." *Id.* at 878. The first issue examined was the content and the Eighth Circuit concluded that the content of the employee's speech did concern a matter of public interest. That was not the end of the court's inquiry, however. The court went on to examine the form and context, including arguments raised by the City that the speech was made only in private and that the employee's motives were personal. *Id.* at 879-880. While the court rejected the defendant's arguments, it recognized them as valid considerations under the *Connick* analysis.

Contrary to Huntsinger's assertion that the Eleventh Circuit "requires courts to consider the motive underlying the speech in order to determine whether or not it is protected" (Pet. at 17), Huntsinger's own authorities again demonstrate that the Eleventh Circuit looks beyond the motive or purpose of the speaker. In *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), the court recognized that, under *Connick*, it should examine the "content, form and context of a given statement as revealed by the whole record." *Id.* at 1352. That court stated: "For *several reasons*, we find that under *Morgan*, Maggio's § 1983 claim does not allege any speech on a matter of public concern." *Id.* (first emphasis added). The court's first consideration

was the forum of the speech, which was at an employee grievance hearing. *Id.* at 1352-53. The second consideration was the content of the speech. *Id.* at 1353. It was only after those issues were reviewed that the Eleventh Circuit looked at the speaker's motivation and the purpose behind her speech in concluding that it was not protected by the First Amendment. *Id.* at 1353-54.

The Seventh Circuit also looks beyond the speaker's motivation. While the court in *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), did look at the "point" of the employee's speech, it also considered the content of what was stated and the manner in which it was communicated. The Seventh Circuit quoted with approval the trial court's comments that the fact that the employee testified in his deposition that he was expressing a personal opinion of his supervisor's work "knocks the props out from under the assertion that [employee] Linhart felt his differences with [supervisor] Glatfelter represented a matter of public concern." *Id.* at 1010. Focusing also on content and the forum where the speech was expressed, the Seventh Circuit noted that, had the employee accused his supervisor of inefficiency or incompetence, or had he publicly criticized his supervisor, his speech would have been protected by the First Amendment. *Id.* at 1011. It is thus improper to characterize this case and this circuit as concentrating only on the speaker's motivation.

Notably, in *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the same circuit court of appeals, in finding that the employee's speech was protected by the First Amendment, stated: "Although the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that

speech, *motive alone is not dispositive.*" *Id.* at 1264 (emphasis added).

In this case, the Tenth Circuit also looked at a variety of the *Connick* factors in reaching its conclusions and did not focus solely on motive as Huntsinger argues. Here, the Court of Appeals noted that the trial court's decision that the speech was not protected by the First Amendment was based on two primary reasons. While it noted its first reason was "that taken as a whole, the complaint demonstrates that Ms. Huntsinger's speech was motivated by primarily personal interest" (Pet. at 15a), the analysis did not stop there. It also recognized the trial court's second reason was that "*in substance* . . . the complaint contained no allegations of corruption or ineptitude on the part of the Authority that would warrant protection of the speech in question." (*Id.*) (emphasis added). In another portion of her petition, Huntsinger acknowledges that the Tenth Circuit examined the content of her speech as well. She states: "The Court in *Huntsinger* placed great emphasis on the lack of allegation that the Authority acted improperly with relation to the potential conflict of interest involved." (Pet. at 21.) Thus, as Huntsinger concedes, the Tenth Circuit in this case looked to the content of the speech as well as the role and motivation of the speaker.

Additionally, Huntsinger does not state what steps this Court should take in response to her argument. The factors to be considered and the appropriate test are well set forth in *Pickering* and *Connick*. Were this Court to mandate that all such factors must be present equally in all cases, lower courts would be constrained artificially and would be unable to weigh each factor in light of the facts before it in determining whether the speech addressed a matter of public concern and should be granted

First Amendment protection. The relevant cases cited by both parties in this action recognized and followed the standards as set forth in *Pickering* and *Connick* as the leading authorities in this area and no further embellishment on those standards is necessary.

II. This Court already has addressed the question of the protection of speech concerning potential wrongdoing and the District Court and the Tenth Circuit Court of Appeals properly determined that Huntsinger's complaint failed to allege any potential governmental misconduct.

Huntsinger argues that certiorari should be granted "to determine whether First Amendment protection should extend to speech relating to a prospective breach of the public trust . . . ." (Pet. at 20.) As Huntinger notes, this Court already has recognized that, in the proper case, speech concerning potential misfeasance may warrant First Amendment protection. *Connick,* 461 U.S. at 148, 103 S.Ct. at 1691. However, *Connick* does not state that such speech is, *per se*, related to a matter of public concern. A court still must evaluate such speech based on the "content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690.

The Tenth Circuit did not hold that no speech concerning potential governmental misconduct merits First Amendment protection. It stated that Huntsinger was seeking protection for speech "made as a preemptive strike against possible misconduct." (Pet. at 21a.) The Tenth Circuit rejected Huntsinger's argument "as presented here." (*Id.*) In other words, the Tenth Circuit's ruling was based on the facts as alleged in this case. Accordingly,

certiorari to consider whether speech concerning potential misconduct should be protected by the First Amendment is unnecessary.

Additionally, the court below was correct in concluding that Huntsinger's complaint lacks any allegation of future or potential wrongdoing. The content of each of her communications concerned only her personal situation and that of her husband. The context in which these matters were raised centered completely on Huntsinger's communications with Hill and the Authority to resolve a personal matter. Her role was always that of an employee trying to deal with a personal employment issue and her point, purpose or motivation was to handle the predicament in which she perceived herself. The complaint contains no facts indicating that she made her speech in the role of a private citizen attempting to bring any actual or potential wrongdoing to the public's attention and no allegations from which any court could discern that the subject matter, motivation or role of the speaker was other than to address an employment issue personal to her.

The complaint demonstrates that the predicament which was the subject of Huntsinger's speech was of her own making when she chose to call a prospective bidder and tell them to pay, or otherwise resolve, a promissory note payable to her husband, before raising the matter with her superiors as required by the acknowledged policies of her employer. (Pet. at 64a, ¶ 15; 63a, ¶ 12.) Accordingly, the lower courts' rulings were correct and a writ of certiorari is not warranted.

III. The District Court and Tenth Circuit Court of Appeals properly dismissed Huntsinger's substantive due process claim as it lacked several elements necessary to state a claim for relief.

The letter and the allegations of the complaint which Huntsinger alleges comprise her substantive due process claim clearly fail to contain all of the elements necessary to establish such a claim. Huntsinger concedes that a substantive due process claim in this context requires "allegations of a termination based on a publicized false charge of sufficient severity that would make her an unlikely candidate for future employment." (Pet. at 24.) The letter on which Huntsinger's substantive due process claim is based is set forth in its entirety in the complaint. (Pet. at 68a-69a, ¶ 28.) The letter fails even to identify Huntsinger as the person discussed therein. Moreover, the complaint contains no allegations that the recipients of that letter had any idea, at the time it was sent, that she was the employee being discussed.

The trial and appellate courts' findings that the complaint's allegations failed to establish the falsity of the letter's contents or damages to Huntsinger as the result also were correct and do not warrant further review by this Court.

CONCLUSION

Eva Huntsinger's complaint concedes that, in violation of the established policies of her employer, she contacted a prospective bidder on a large construction project and discussed financial matters involving the payment of significant sums to her husband, before she contacted her

employer about the matter. The decision of the Tenth Circuit Court of Appeals in affirming the dismissal of her complaint was based on established precedent of this Court, was in keeping with decisions of other Circuit Courts of Appeal and was appropriate on the merits. The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

EDWARD J. BLIESZNER
Counsel of Record
SARA WAGERS-JOHNSON

ICENOGLE, NORTON, SMITH,
BLIESZNER & MILLER, P.C.
821 Seventeenth Street
Suite 600
Denver, Colorado 80202
(303) 292-6400

Attorneys for Respondent

No. 02-407

Supreme Court, U.S.
FILED
OCT 28 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

EVA B. HUNTSINGER,
Petitioner,

v.

BOARD OF DIRECTORS OF THE E-470 PUBLIC HIGHWAY AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

SANDER N. KARP
Counsel of Record

LEAVENWORTH & KARP, P.C.
1011 GRAND AVENUE
P.O. DRAWER 2030
GLENWOOD SPRINGS, CO 81602
(970) 945-2261
(970) 945-7336 fax

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Does both an inter-circuit and an intra-circuit split among the Courts of Appeal exist regarding which speech constitutes a matter of public concern under *Connick*?

2. Is a public employee's disclosure of a potential conflict of interest protected under the First Amendment as speech concerning a potential breach of the public trust?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Reply Brief of the Petitioner 1

I. This Court Should Grant Certiorari Because Both An Inter-Circuit Split And An Intra-Circuit Split Of Authority Exists Regarding Which Speech Is A Matter Of Public Concern And Therefore Afforded Protection Under The First Amendment. 1

II. Speech By A Public Employee Disclosing A Potential Conflict Of Interest Is Speech Concerning A Potential Breach Of The Public Trust, And Should Therefore Be Afforded Protection Under The First Amendment. 9

Conclusion 10

TABLE OF AUTHORITIES

CASES **Page(s)**

Arvinger v. Mayor and City Council of Baltimore,
862 F.2d 75 (4th Cir. 1988) 5

Azzaro v. County of Allegheny,
110 F.3d 968 (3rd Cir. 1997) 7

Belk v. City of Eldon,
228 F.3d 872 (8th Cir. 2000),
cert. denied, 532 U.S. 1008,
121 S.Ct. 1734 (2001) 3, 7

Belk v. Town of Minocqua,
858 F.2d 1258 (7th Cir. 1988) 6

Berger v. Battaglia,
779 F.2d 992 (4th Cir. 1985),
cert. denied, 476 U.S. 1159,
106 S.Ct. 2278 (1986) 5

Boring v. Buncombe County Bd. of Educ.,
136 F.3d 364 (4th Cir. 1998),
cert. denied, 525 U.S. 813,
119 S.Ct. 47 (1998) 4, 5

Chappel v. Montgomery County Fire Protection,
131 F.3d 564 (6th Cir. 1997) 3

Cockrel v. Shelby County School Dist.,
270 F.3d 1036 (6th Cir. 2001),
cert. denied, 532 U.S. 1008,
121 S.Ct. 1734 (2001) 3

Connick v. Myers,
461 U.S. 138, 103 S.Ct. 1684,
75 L.Ed.2d 708 (1983) . . . . . *passim*

David v. City and County of Denver,
101 F.3d 1344 (10th Cir. 1996),
cert. denied, 522 U.S. 858,
118 S.Ct. 157 (1997) 6, 7

Farmer v. Cleveland Public Power,
295 F.3d 593 (6th Cir. 2002) 3

Gardetto v. Mason,
100 F.3d 803 (10th Cir. 1996) 7

Kincade v. City of Blue Springs,
64 F.3d 389 (8th Cir. 1995),
cert. denied, 517 U.S. 1166,
116 S.Ct. 1565 (1996) 7

Linhart v. Glatfelter,
771 F.2d 1004 (7th Cir. 1985) 5, 6

Maggio v. Sipple,
211 F.3d 1346 (11th Cir. 2000) 5

Perry v. McGinnis,
209 F.3d 597 (6th Cir. 2000) 3

Piver v. Pinder County Bd. of Educ.,
835 F.2d 1076 (4th Cir. 1987),
cert. denied, 487 U.S. 1206,
108 S.Ct. 2847 (1988) 5

Urofsky v. Gilmore,
216 F.3d 401 (4th Cir. 2000),
cert. denied, 531 U.S. 1070,
121 S.Ct. 759 (2001) 3, 4

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following points in the Brief in Opposition.

REPLY BRIEF OF THE PETITIONER

I. This Court Should Grant Certiorari Because Both An Inter-Circuit And An Intra-Circuit Split Of Authority Exists Regarding Which Speech Is A Matter Of Public Concern And Therefore Afforded Protection Under The First Amendment.

This Court's decision in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), articulates a broad standard to measure when a public employee's speech touches on a matter of public concern. The Court defined speech on a "matter of public concern" as speech which can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. at 1690. The Court instructed the lower courts to determine whether or not speech addresses a matter of public concern by considering the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690.

However, the lower courts inconsistently apply the "content, form, and context" test in that the various courts weigh the factors differently. As noted in the Petitioner's Brief, the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits give determinative weight to the **context** of the speech by emphasizing the role or motive of the speaker. In contrast, the Sixth and Eighth Circuits give determinative weight to the **content** of the speech. Even within the circuits, different panels of the Courts of Appeal apply the "content, form, and context" test inconsistently, as set out in the Respondent's Brief. Both an inter-circuit and intra-circuit split regarding application of the *Connick* test results.

Although *Connick* does not explicitly state the relative weight to be given each factor in the "content, form, and context" test, this Court intended that the content of the speech be the determinative factor. *Id.* at 148-49, 103 S.Ct. at 1690-91. The Court in *Connick* found that the majority of the questions in Myers's questionnaire were not matters of public concern because, if released to the public, they would convey no information beyond a single employee's dissatisfaction with the status quo. *Id.* at 148, 103 S.Ct. at 1691. However, one question addressing pressure on employees to work on political campaigns **did touch on a matter of public concern**. *Id.* at 149, 103 S.Ct. at 1691 (emphasis added). The Court found that there was a demonstrated interest in the country that government service should be based on merit and not politics. *Id.* This question was presented in an identical form and context as the other questions on the questionnaire. However, because the **content** touched on a matter of public concern, the Court afforded First Amendment protection to Myers's speech, at least regarding this limited question. *Id.* The *Connick* analysis reveals that while the form and context of a public employee's speech are relevant in the determination of whether or not that speech touches upon a matter of public concern, the content should be given determinative weight.

The Respondent argues that there is not a definitive split among the Courts of Appeal. Rather, it states that different courts merely emphasize different factors from *Connick* depending on the facts of each case. Brief in Opp. at 3.[1] However, there is a clear split among the Circuits with

---

[1] Respondent acknowledges that *Connick* requires consideration of the "unique factual circumstances" of each case. Brief in Opp. at 3. However, the Tenth Circuit Court dismissed Petitioner's case as a result of a F.R.C.P. 12(b)(6) Motion to Dismiss. Therefore, Petitioner has been

regard to which factor receives determinative weight.

The Respondent asserts that the Sixth Circuit looks beyond the content of an employee's speech when determining whether or not to afford protection. Indeed, the Sixth Circuit correctly acknowledges the requirement to review the content, form, and context to determine if speech touches on a matter of public concern. *See Farmer v. Cleveland Public Power*, 295 F.3d 593, 600 (6th Cir. 2002). However, the Sixth Circuit emphasizes the content of a public employee's speech and affords that limited factor critical importance in considering speech under *Connick*. *See Cockrel v. Shelby County School Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) *cert. denied*, No. 01-1548, 2002 WL 706612 (U.S. Oct 7, 2002); *Perry v. McGinnis*, 209 F.3d 597, 608 (6th Cir. 2000); *Chappel v. Montgomery County Fire Protection*, 131 F.3d 564, 575 (6th Cir. 1997). *See also Belk v. City of Eldon*, 228 F.3d 872, 880, (8th Cir. 2000) *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734 (2001) (giving determinative weight to the content of the speech after considering the form and context).

By contrast, the Fourth Circuit has recently taken the position that the role, and thus the context, in which the public employee speaks constitutes the determinative factor when considering First Amendment protection. In *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert denied*, 531 U.S. 1070, 121 S.Ct. 759 (2001), the Court stated:

> Thus, critical to the determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.'

---

denied the opportunity to develop and present the factual basis supporting such a fact-driven analysis of her speech.

Id. at 407 (*quoting Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948 (1987)). *Urofsky* relied upon *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 119 S.Ct. 47 (1998) (selection of a play by a high school drama teacher did not involve a matter of public concern because the teacher made the decision in her capacity as a teacher, and thus in her role as an employee). *See Urofsky*, 216 F.3d at 407.

The *Urofsky* court held that even when speech by a public employee involves matters of **"vital concern to the public,"** such employees will not receive First Amendment protection when the employee speaks as an employee as opposed to a citizen. *Id.* (emphasis added).

The *Urofsky* decision contradicts the Supreme Court's analysis in *Connick* and underscores the Circuit split. In *Connick*, Myers spoke in her role as an employee when she distributed the questionnaire to her co-employees. Despite this, the content of one of her questions merited a finding that her speech touched on a matter of public concern. *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691. By contrast, the Fourth Circuit gives determinative weight to the "role" of the speaker, rather than the content of the speech, even where that content may be of "vital concern to the public". *See Urofsky* 216 F.3d at 426-27 (J. Wilkinson's concurring opinion disagreeing with the majority's exclusive emphasis on the role of the speaker); *see also Id.* at 436 (J. Murnaghan dissenting opinion finding that the majority's decision is contrary to the Supreme Court's decision in *Connick*).

Judge Murnaghan's dissenting opinion in *Urofsky* further details an intra-circuit split within the Fourth Circuit. *Id.* at 436-37 (citing *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1080 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2847 (1988) (teacher's speech raised matter

of public concern; although made in her role as an employee, the speech addressed a "matter in which the community... was vitally interested".); *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2278 (1986) (focus should be on the public importance of the speech); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (although *Connick* did not elaborate on the relative weight to be accorded the three factors, the Fourth Circuit has held that content, subject-matter, is always the central aspect.)). *See also Boring*, 136 F.3d at 379 (J. Motz, dissenting, recognizing that the majority gives a determinative weight to the role of the speaker, which is contrary to *Connick*).

An analysis of Seventh Circuit decisions further reveals the existence of both an inter-circuit and intra-circuit split regarding the application of the "content, form, and context" test. In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), the court held that the "touchstone" of *Connick* was the difference between matters of public concern and matters of personal interest. The court then emphasized the role of the speaker by giving determinative weight to the point of the speech. In other words, the court emphasized the employee's motivation in making the speech. *Id.* (*quoting Connick*, 461 U.S. at 147, 103 S.Ct. at 1690). *See also Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (giving determinative weight to the speaker's motivation).

Thus, *Linhart* is contrary to *Connick*. In *Connick*, Myers's point or motivation in asking about pressure to work on political campaigns did not differ from her point or motivation in asking the other questions on the questionnaire, namely to gather "ammunition for another round of controversy with her superiors". *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691. Despite this, the content of this question raised a matter of such significance that the Court deemed the

speech a matter of public concern. *Id.* at 149, 103 S.Ct. at 1691.

In a later decision by the Seventh Circuit, cited by the Respondent, the court held that the content of a public employees speech should receive determinative weight. In *Belk v. Town of Minocqua*, 858 F.2d 1258 (7th Cir. 1988), the court found:

> Although the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive. A fair reading of *Connick* simply will not support the use of such a litmus test. Despite the Court's explicit finding that Myers's questionnaire was motivated by a personal dispute, the content of her speech was paramount to the Court's finding that a public issue was implicated. *This court also has recognized that content is the greatest single factor in the Connick inquiry.*

Id. at 1264 (emphasis in original) (citing *Linhart*, 771 F.2d at 1010 as supporting a position contrary to the *Belk* decision). This decision further reveals an intra-circuit split within the Seventh Circuit regarding which *Connick* factor should receive determinative weight.

Like the Fourth and Seventh Circuits, the Tenth Circuit emphasizes the role or motive of the speaker when determining if a public employee's speech touches upon a matter of public concern. In *David v. City and County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996), *cert. denied*, 522 U.S. 858, 118 S.Ct. 157 (1997), the court, while stating the correct "content, form, and context" standard, found that "the **fundamental inquiry** is whether the plaintiff speaks as

an employee or as a citizen." (Emphasis added.) The Court recognized that individuals, speaking as employees, can speak on matters of public concern under *Connick*, but despite this, the *David* court held that the plaintiff's speech was not protected because she spoke primarily in her role as an employee rather than a citizen. *Id.* at 1356. The result in *David*, therefore, comports with the Fourth and Seventh Circuit analysis set forth above in that the context of the speech is afforded determinative weight.

A decision from the Third Circuit disagreed with the Tenth Circuit's analysis in *David*. In *Azzaro v. County of Allegheny*, 110 F.3d 968, 979 (3rd Cir. 1997), the court found that the inquiry into the role of the speaker provides an alternative way of inquiring into the motive of the speaker. The court went on to state that while motive may be relevant, giving motive controlling significance is inconsistent with *Connick*. *Id.*

Similar to the *David* court, the lower court in Ms. Huntsinger's case gave controlling significance to Ms. Huntsinger's alleged motives in speaking, while giving little weight to the content of the speech. That approach severely discounted the content of Ms. Huntsinger's speech in that she brought to light a potential conflict of interest regarding a publicly funded state toll-way construction project. Petition, App. B at 15a. Where, as here, the content of speech addresses the use of public funds, courts have repeatedly recognized such speech as touching upon a matter of public concern. *See Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996); *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995) *cert. denied*, 517 U.S. 1166, 116 S.Ct. 1565 (1996); *Belk*, 228 F.3d at 878. By placing a greater emphasis on Ms. Huntsinger's alleged motives, rather than the content of her speech, the Tenth Circuit's decision lacks consistency with the analysis set forth in *Connick*.

The Respondent characterizes the Tenth Circuit's inquiry regarding whether or not Ms. Huntsinger's speech addressed active malfeasance by the Authority as an inquiry into the content of the speech. Brief in Opp. at 8. Contrary to the Respondent's argument, however, the court's inquiry reflected its attention to Ms. Huntsinger's alleged **motivation** in speaking, rather than the **content** of the speech. Indeed, the Court went on to discuss Ms. Huntsinger's alleged motives in issuing the speech and, based on that analysis, held that her speech related solely to her personal interest. Petition, App. B at 15a. The court then stated that the complaint lacks specific reference to allegations of the Authority's corruption or malfeasance. *Id.* at 18a. Perhaps most significantly, the Court next determined the "purpose" behind each of Ms. Huntsinger's communications. *Id.* at 18a-19a. In this context, the court continued to emphasize and examine Ms. Huntsinger's motives, ultimately concluding that Ms. Huntsinger sought to deal solely with a personal matter. *Id.* at 20a. The Tenth Circuit's analysis did not sufficiently address the content of Ms. Huntsinger's speech, but focused determinatively on the motivations underlying same.

Indeed, the actual content of Ms. Huntsinger's speech dealt with a potential conflict of interest between her employer and a bidder on the procurement process for a public highway project. Had Ms. Huntsinger left the conflict of interest unaddressed, its existence may have given the appearance of impropriety on the part of the Authority in its distribution of public funds and its public procurement practices. Further, the content of these communications can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. And therefore, Ms. Huntsinger's speech should be protected.

Given the confusion and inconsistency among the lower courts when applying the "content, form, and context" test under *Connick*, the Petitioner requests that this Court grant certiorari to set an authoritative standard which gives determinative weight to the content of a public employee's speech when determining whether such speech is protected under the First Amendment.

II. Speech By A Public Employee Disclosing A Potential Conflict Of Interest Is Speech Concerning A Potential Breach Of The Public Trust, And Should Therefore Be Afforded Protection Under The First Amendment.

The Respondent argues that the Court need not address the question of whether or not the Petitioner's speech concerns a potential breach of the public trust, entitling her to First Amendment protection. Brief in Opp. at 9. However, the Tenth Circuit explicitly rejected protection of speech made as a supposed preemptive strike against possible misconduct. Petition, App. B at 21a. The Petitioner asserts that the facts surrounding her case are the type that the Supreme Court intended to address when it stated in *Connick* that speech meant to bring to light a potential breach of the public trust should be protected. *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691.

As stated both in the Petition and above, Ms. Huntsinger intended to disclose a potential conflict of interest regarding a public procurement on a state toll-way project. Petition, App. F. at 65a-66a. Public employees, such as Ms. Huntsinger, are the keepers of the public trust due to their roles in managing and distributing public funds. Therefore, speech intended to ensure the conduct of such distributions in an unbiased manner should be protected as an attempt to "bring to light... [a] potential wrongdoing or breach of public trust". *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691.

Further, the Respondent characterizes the "predicament" which is the subject of this case as one of Ms. Huntsinger's own making. Brief in Opp. at 10. Contrary to that position, Ms. Huntsinger played no role in "creating" the potential conflict of interest at issue here. In fact, no potential conflict of interest existed until CH2M Hill, the entity which had a potential conflict of interest with the Authority, entered its bid to work on the public highway project. Ms. Huntsinger, who had long been employed at the Authority as a public servant, merely responded to the potential conflict once it became apparent to her. Ms. Huntsinger attempted to deal with the conflict in a manner consistent both with the Authority's prior dealings in similar conflict of interest situations as well as with the Authority's policies regarding disclosure of such conflicts. Therefore, with the Authority's knowledge, Ms. Huntsinger attempted to resolve said conflict accordingly. Thus, the "predicament" underlying this case cannot be fairly attributed to the Petitioner's own making.

The Petitioner requests this Court's grant of certiorari to determine whether or not a public employee's disclosure of a potential conflict of interest is within the purview of a potential breach of the public trust, and therefore protected under the First Amendment.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests this Court's grant of certiorari.

Respectfully submitted,

Sander N. Karp
Leavenworth & Karp, P.C.
Counsel for the Petitioner